COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Pinnacle Living (Capstan Village) Lands Inc. v. Fairway Recycle Group Inc.*, 2024 BCCA 172

Date: 20240502
Docket: CA49248

Between:

Pinnacle Living (Capstan Village) Lands Inc. and Mondiale Development Ltd.

Appellants
(Petitioners)

And

Fairway Recycle Group Inc.

Respondent
(Respondent)

Corrected Judgment: The text of the judgment was corrected at paragraph 62 on May 27, 2024.

Before: The Honourable Justice Griffin
The Honourable Mr. Justice Voith
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated June 30, 2023 (*Pinnacle Living (Capstan Village) Lands Inc. v. Tarrier Group Inc.*, 2023 BCSC 1315, Vancouver Docket S231371).

Counsel for the Appellants:	A. Cameron A.D. Butler
Counsel for the Respondent:	K.E. Ducey
Place and Date of Hearing:	Vancouver, British Columbia February 9, 2024
Place and Date of Judgment:	Vancouver, British Columbia May 2, 2024

Written Reasons by:
The Honourable Justice Griffin

Concurred in by:
The Honourable Mr. Justice Voith
The Honourable Justice Skolrood

Summary:

The appellants, owner and head contractor, engaged a subcontractor to provide work and materials for a project. The subcontractor then contracted with another subcontractor, the respondent Fairway Recycle Group Inc. After the subcontractor failed to pay outstanding invoices owed to Fairway, the appellants allegedly agreed to pay the invoices in return for Fairway's agreement to not file a lien claim. When the appellants did not pay, Fairway filed a lien claim. The appellants applied to discharge the lien claims of all subcontractors, upon payment into court of a certain amount, relying on s. 23 of the Builders Lien Act. The judge held that, because of the subsequent direct contract between Fairway and the appellants, the appellants could not rely on s. 23 to discharge the Fairway lien. The appellants argue that the judge erred in her interpretation of this provision.

Held: Appeal allowed. The judge erred in finding that because of the subsequent agreement with the appellants to pay past invoices, Fairway was no longer in the "class of lien claimants other than a class of lien claimants engaged by the owner". Section 23 refers to contracts to provide work or materials to an improvement. As Fairway's contract to provide work or materials was with a subcontractor, not the appellants, s. 23 applied and the lien should be discharged.

Reasons for Judgment of the Honourable Justice Griffin:

[1] This appeal raises the question of whether a contract entered into between an owner and subcontractor, by which the owner agrees to pay outstanding amounts to the subcontractor, after the subcontractor has already supplied its work and services under its contract with another subcontractor, can alter the owner's right to discharge the subcontractor's lien under s. 23 of the *Builders Lien Act*, S.B.C. 1997, c. 45 (the "*Act*").

[2] The chambers judge held that the owner's new contract altered the owner's ability to rely on s. 23 of the *Act*.

[3] In particular, the chambers judge held that the new contract meant that the subcontractor was no longer in the class of lien claimants "other than a class of lien claimants engaged by an owner" whose lien could be discharged upon the owner's payment of the prescribed amount into court.

[4] The owner, Pinnacle Living (Capstan Village) Lands Inc. (the "Owner"), and its head contractor, Mondiale Development Ltd. ("Mondiale"), appeal and say the judge was in error.

[5] The respondent subcontractor, Fairway Recycle Group Inc., ("Fairway"), submits that the judge was correct.

[6] For the reasons that follow, I am of the view that the judge erred in the interpretation of s. 23 of the *Act*, and I would allow the appeal.

Relevant Sections of the *Act*

[7] This appeal turns on the meaning of s. 23 of the *Act*, which provides in part:

> **23** (1) If a claim of lien is filed by one or more members of a class of lien claimants, other than a class of lien claimants engaged by an owner, the owner, contractor, subcontractor or mortgagee authorized by the owner to disburse money secured by a mortgage may, on application, pay into court the lesser of
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> (a) the total amount of the claim or claims filed, and

(b) the amount owing by the payor to the person engaged by the payor through whom the liens are claimed

provided the amount is at least equal to the required holdback in relation to the contract or subcontract between the payor and that person or, if the payment is made by a purchaser to whom section 35 applies, 10% of the purchase price of the improvement.

(2) Payment into court under an order made under subsection (1) discharges the owner from liability in respect of the claims of lien filed and

(a) the money paid into court stands in place of the improvement and the land or mineral title, and

(b) the order must provide that the claims of lien be removed from the title to the land or mineral title.

…

[Emphasis added.]

[8] Also relevant are certain definitions set out in s. 1 of the *Act*:

1 (1) In this Act:

…

"claim of lien" means a claim of lien in the prescribed form;

"class of lien claimants" means all lien claimants engaged by the same person in connection with an improvement;

…

"improvement" includes anything made, constructed, erected, built, altered, repaired or added to, in, on or under land, and attached to it or intended to become a part of it, and also includes any clearing, excavating, digging, drilling, tunnelling, filling, grading or ditching of, in, on or under land;

…

"lien claimant" means a person who files a claim of lien under this Act;

"lien holder" means a person entitled to a lien under this Act;

…

"owner" includes a person who has, at the time a claim of lien is filed under this Act, an estate or interest, whether legal or equitable, in the land on which the improvement is located, at whose request and

(a) on whose credit,

(b) on whose behalf,

(c) with whose knowledge or consent, or

(d) for whose direct benefit

work is done or material is supplied, and includes all persons claiming under the owner, but does not include a mortgagee unless the mortgagee is in possession of the land;

…

“subcontractor" means a person engaged by a contractor or another subcontractor to do one or more of the following in relation to an improvement:

(a) perform or provide work;

(b) supply material;

but does not include a worker or a person engaged by an architect, an engineer or a material supplier;

…

"work" means work, labour or services, skilled or unskilled, on an improvement;

…

[Emphasis added.]

[9] Section 2 of the *Act* describes the right to a lien, and provides:

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.

[Emphasis added.]

[10] Section 4 sets out the general holdback requirements, and states, in part:

> **4** (1) The person primarily liable on each contract, and the person primarily liable on each subcontract, under which a lien may arise under this Act must retain a holdback equal to 10% of the greater of
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> (a) the value of the work or material as they are actually provided under the contract or subcontract, and
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> (b) the amount of any payment made on account of the contract or subcontract price.
>
> (2) The obligation to retain the holdback under subsection (1) applies whether or not the contract or subcontract provides for periodic payments or payment on completion.
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> (3) For the purposes of subsection (1), value must be calculated on the basis of the contract or subcontract price or, if there is no specific price, on the basis of the actual value of the work or material.
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> ….
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> (9) Subject to section 34, a holdback required to be retained under this section is subject to a lien under this Act, and each holdback is charged with payment of all persons engaged, in connection with the improvement, by or under the person from whom the holdback is retained.
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> [Emphasis added.]

[11] Section 21 describes when a claim of lien takes effect:

> **21** A claim of lien filed under this Act takes effect from the time work began or the time the first material was supplied for which the lien is claimed, and it has priority over all judgments, executions, attachments and receiving orders recovered, issued or made after that date.

[12] I turn now to the relevant facts.

Background

[13] The Owner is the developer of a multi-phase mixed-use development project in Richmond, BC. Mondiale is the head contractor for the project (together, the "appellants").

[14] Mondiale engaged Tarrier Group Inc. ("Tarrier") under a fixed price subcontract, to supply labour, materials, tools and equipment for the installation of a

cutter soil mixing wall and related shoring, excavation and dewatering (the "Subcontract Work").

[15] Tarrier in turn engaged various subcontractors ("Tarrier Subcontractors"), including Fairway, to perform portions of the Subcontract Work. Tarrier was responsible to pay the accounts of its subcontractors.

[16] Fairway was engaged by Tarrier to provide materials, trucking services and disposal services to Tarrier in exchange for payment (the "Fairway Subcontract").

[17] Fairway provided services to Tarrier under the Fairway Subcontract, between January and April 2022. Tarrier did not pay the invoices that Fairway issued to it for these services.

[18] Up to this point, there was no question that Fairway was engaged by Tarrier, and not the Owner.

[19] On May 27, 2022, after some discussion between the Owner, Fairway and Tarrier about the outstanding invoices, the Owner allegedly agreed with Fairway in an email that it would pay the invoices by June 1, 2022, in return for Fairway refraining from filing a claim of lien on the project lands. For ease of reference I will refer to this as the "Payment-Forbearance Agreement". The key issue on this appeal has to do with the impact of this Payment-Forbearance Agreement on lien rights.

[20] I should add that the enforceability and substance of the Payment-Forbearance Agreement is at issue in other litigation and has simply been assumed for purposes of this appeal. Northing in this judgment is meant to predetermine the issues in other litigation regarding the Payment-Forbearance Agreement.

[21] A number of Tarrier Subcontractors, other than Fairway, then filed lien claims.

[22] On June 1, 2022, the Owner did not pay Fairway's outstanding invoices issued to Tarrier, nor did it do so subsequently.

[23] Fairway filed a claim of lien in the amount of $113,700 on July 26, 2022 (the "Fairway Lien").

[24] The lien claims advanced by the Tarrier Subcontractors, including Fairway, total $3,452,026.66.

[25] On August 2, 2022, Mondiale terminated the Tarrier Subcontract.

[26] The appellants brought a petition to remove and discharge their liability in respect of Tarrier Subcontractor liens, including the Fairway Lien, pursuant to s. 23 of the *Act*, and Supreme Court Civil Rule 10-3 (the interpleader rule), upon paying into court $95,812.50 in statutory holdback funds. This amount was calculated based on what the appellants said was 10% of the maximum price of all work actually completed by Tarrier, pursuant to s. 23(1)(b) and s. 4(1) of the *Act*. This calculation is not challenged on appeal. For ease of reference, I will refer to this amount as the "Holdback Funds".

[27] Tarrier commenced a separate action seeking recovery of the amounts owed to it for its work, as against Mondiale and against the Owner.

Chambers Judgment, 2023 BCSC 1315

[28] At issue on appeal is the aspect of the chambers judgment regarding the appellants' application to discharge the Tarrier Subcontractor liens pursuant to s. 23 of the *Act*, on payment of the Holdback Funds. The part of the chambers judge's decision addressing Tarrier's own lien claim is not at issue.

[29] The judge found that the appellants were entitled to a discharge of all Tarrier Subcontractors liens except the Fairway Lien, on payment into court of the Holdback Funds.

[30] The reason that the appellants were not entitled to discharge of the Fairway Lien had to do with the Payment-Forbearance Agreement between the Owner and Fairway.

[31] The judge recognized that Fairway was retained by Tarrier and supplied its work and materials to Tarrier: para. 18.

[32] Fairway argued that the Payment-Forbearance Agreement took Fairway outside of the "class of lien claimants, other than a class of lien claimants engaged by an owner" in s. 23.

[33] In considering this argument, the judge referred to authorities addressing the purpose of the *Act*, and s. 23, noting:

> [23] The general objectives of the *BLA* were described in *Centura Building Systems (2013) Ltd. v. 601 Main Partnership*, 2018 BCCA 172, at para. 19:
>
> > In general, the objective of builders lien legislation is to prevent the owners of land from obtaining the benefit of improvements and work done on their land without paying for them by giving security to lien claimants. The Act balances this policy against the rights of owners by providing a mechanism to discharge a lien upon the payment of sufficient security (s. 24), or to cancel a claim of lien where the claim is defective, vexatious, frivolous or an abuse of process (s. 25).
>
> [24] In *GM Electric & Gyp-Right v. Lin*, 2000 BCSC 1260, Master Groves, as he then was, described the purpose of s. 23 of *the BLA* as follows:
>
> > I pause at this point to make some comments about what appears to be the purpose of s.23. Section 23 purports to allow an owner to essentially absent himself from litigation that may develop between a developer or contractor and subsequent lien claimants. The section appears to allow to place no further consequences on an owner other than paying the full amount of the liens, or paying the amount of the lien holdback he owes. The logic behind this is clear. The legislature desires to protect owners from the consequence of any problems which may develop "down the chain" so to speak, between a general contractor, subcontractors, material men, and so on. The legislation clearly is designed to allow owners to remove themselves from the disputes which, as I have said above, develop down the line by paying either the amount of the liens or the amount of the holdback, whichever is less.
>
> [25] In *Port Royal Riverside Development v. Vadasz*, 1998 CanLII 2175 (BCSC), Master Joyce, as he then was, held that for the purpose of s. 23, there must be at least one person between the owner and the claimant in the contractual claim.

[34] The chambers judge concluded that the Payment-Forbearance Agreement transformed the contractual relationships, stating at para. 27:

> While Pinnacle did not engage Fairway, in my view, when it agreed to pay these invoices, it created a situation in which there was not at least one party between it and Fairway in the contractual chain. What it agreed to pay were invoices which could give rise to the right of a lien.

[35] In the result, the chambers judge concluded that Fairway was no longer in the class of subcontractor lien claimants subject to s. 23.

[36] The appellants were thus unable to discharge the Fairway Lien pursuant to s. 23 of the *Act*. They were able to discharge all other Tarrier Subcontractor liens upon payment into court of the Holdback Funds.

Grounds of Appeal

[37] The appellants submit that the judge erred in the interpretation and application of s. 23 of the *Act*.

Analysis

[38] Whether the chambers judge erred, in determining that Fairway fell outside of the class of lien claimants to which s. 23 applies, turns on her interpretation of the *Act* which raises issues of law reviewable on a standard of review of correctness: *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at paras. 43, 76.

[39] The facts of this case involve two separate types of contractual arrangements with a subcontractor lien claimant:

1. A contract between a subcontractor, Tarrier, and its subcontractor, Fairway, for which Fairway supplied work and services to Tarrier in relation to an improvement on the Owners' land, and was to be paid by Tarrier (the Fairway Subcontract); and

2. A contract between the Owner and Fairway, entered into after Fairway had already performed its work and services for Tarrier, by which the Owner agreed to pay the amount owed to Fairway by Tarrier, in return for

Fairway's forbearance in filing a lien (the Payment-Forbearance Agreement).

[40] There is no dispute that if the first type of contractual arrangement was the only arrangement, then Fairway fell within the class of lien claimants to which s. 23 of the *Act* is meant to apply. It was not in the class of lien claimants engaged by the Owner.

[41] The question on this appeal is whether the second contractual arrangement between the Owner and Fairway transformed the lien rights and obligations under the *Act*, taking Fairway outside of the class of lien claimants to which s. 23 applies. In my view, the correct answer to this question is no.

[42] The approach under the *Act* to two separate types of contractual arrangements with subcontractor lien claimants was addressed in *Pilot Homes Ltd. v. Seagreen Construction & Developments Inc.*, 2008 BCSC 1871. Unfortunately, it appears this case was not brought to the attention of the learned chambers judge.

[43] In *Pilot Homes*, the owner, Pilot Homes, had engaged Seagreen Construction as general contractor. Seagreen in turn engaged a number of subcontractors.

[44] Seagreen withdrew mid-project. Pilot Homes then re-engaged the various subcontractors directly. It promised to pay them for the work to be done in their new direct contract with Pilot Homes, and allegedly also promised to pay them all amounts that Seagreen owed for past work.

[45] When the project completed, Pilot Homes sought to discharge all the liens under s. 23 of the *Act*. The subcontractors argued that the lien claims could not be discharged pursuant to s. 23 because Pilot Homes, as owner, had directly engaged them.

[46] In *Pilot Homes*, Justice Groberman, as he then was, treated the two separate contractual arrangements differently. He determined that for the period of the first type of contractual arrangements, when the subcontractors were directly engaged by

the general contractor Seagreen, Pilot Homes was entitled to discharge the portion of the lien claims related to that work, pursuant to s. 23: para. 9.

[47] In other words, in *Pilot Homes*, the fact that the subcontractor lien claimants allegedly had subsequent direct contractual arrangements with the owner to pay them for past work, did not alter the nature of the prior contractual arrangements they had as subcontractors to the general contractor. At the time when they supplied work and materials as subcontractors, s. 23 applied to liens arising from that work and materials, and this did not change simply because the owner later made a contract to pay for that past work.

[48] However, Groberman J. also held in *Pilot Homes* that subsequently, when the former subcontractors then supplied additional work and materials under direct contract to Pilot Homes as owner, s. 23 no longer applied to that portion of the lien claims filed in relation to the later contractual arrangements.

[49] If the analysis in *Pilot Homes* was applied here, one must conclude that s. 23 applied to the Fairway Lien. The Fairway Lien was in relation to work supplied by Fairway to Tarrier under subcontract. None of Fairway's work, forming the basis of the Fairway Lien, was supplied under contract to the Owner. The Owner's subsequent agreement to pay for the past work did not change the nature of the prior contractual arrangements giving rise to the lien claim.

[50] In my view, the approach in *Pilot Homes* to the interpretation of s. 23 of the *Act* is consistent with the modern approach to statutory interpretation. This requires that the words of a statute be read in their entire context, and in their grammatical and ordinary sense harmoniously with the scheme and purpose of the statute: see discussion by Justice Horsman in *Wang v. British Columbia (Securities Commission),* 2023 BCCA 101 at paras. 39–43. The modern approach may give rise to an ambiguity, that is, two capable interpretations of the words. However, in my view, no ambiguity arises in this case.

[51] The purpose of the *Act* is to offer some protection to persons who provide work or materials contributing to an improvement to land. It does so by providing some security for payment for the work and materials supplied to an improvement, through holdback obligations and the lien process. This prevents owners from taking the benefit of improvements to their land without paying for them. However, the *Act* also balances these protections against the rights of owners of the land, by providing owners with a means to clear their title of liens, if the owners provide some partial payment for the work and materials supplied, in the amounts provided for under the *Act*: see Groberman J.A. in *JVD Installations Inc. v. Skookum Creek Power Partnership*, 2022 BCCA 81 at para. 40.

[52] When interpreting s. 23 in light of its statutory purpose and context, one must keep in mind that the rights and obligations under the *Act* begin when the work or material is supplied to an improvement. A lien claim arises when the work begins or material is first supplied: s. 21. Statutory holdback obligations of owners, and of contractors engaging subcontractors, also depend on the contractual arrangements that exist at the time the work or materials are provided: s. 4.

[53] As stated in David Coulson & Dirk Laudan, *Guide to Builders' Liens in British Columbia* (Toronto: Thomson Reuters Canada, 2020) at § 1:1:

> The lien is created as the work is done and, by s. 21 of the Act, takes effect from the time when the work or materials are supplied, not when the lien is filed.

[54] Further, the definition of "class of lien claimants" means "all lien claimants engaged by the same person in connection with an improvement" (my emphasis). Thus, the language of s. 23, referring to a "class of lien claimants" "other than a class of lien claimants engaged by an owner", is only referring to the contractual arrangements dealing with the work or materials provided to an improvement.

[55] The contractual arrangements that are relevant under the *Act* for the purpose of s. 23 are therefore the contracts to supply work or materials to an improvement, that existed when that work and those materials were provided.

[56] The *Act* does not purport to govern all other types of contractual arrangements between owners, contractors and subcontractors.

[57] Here, when the work in relation to an improvement was provided by Fairway, it was provided under subcontract to Tarrier. This is what gave rise to its lien rights in the first place, and gave rise to holdback obligations. This is the relevant contract for purposes of s. 23 of the *Act*.

[58] The subsequent Payment-Forbearance Agreement between the Owner and Fairway did not have a retroactive effect of changing the contractual arrangements between Fairway and Tarrier at the time Fairway provided its work in relation to an improvement. The Payment-Forbearance Agreement was not a contract to provide work or materials. As such, the Payment-Forbearance Agreement did not create lien rights, just as it did not change or create new holdback obligations.

[59] For these reasons, I am of the view that s. 23 applied to the Fairway Lien and the Owner was entitled to have that lien discharged on payment of the Holdback Funds. Respectfully, the chambers judge erred in determining that the Payment-Forbearance Agreement placed Fairway outside of the class of lien claimants to which s. 23 applied.

[60] This result, does not, of course, affect Fairway's separate rights to bring an action for remedies for alleged breach of the Payment-Forbearance Agreement.

Disposition

[61] I would allow the appeal, as I am of the view that s. 23 of the *Act* applies to the Fairway Lien.

[62] This result would affect the Judge's order made June 30, 2023, as follows:

1. setting aside terms 3 and 4 of the order;

2. adding Fairway to the group of lien claimants whose liens are discharged in term 2(b) of the order and including its lien in the definition of "Subcontractor Liens" in the order;

3. clause 2(c) and (d) will apply to the Fairway Lien, dealing with cancellation of the lien and related certificates of pending litigation, and instructions to the Registrar of Land Titles in this regard;

4. however, for clarity, clause 2(e) of the order, precluding all other claims, would not apply to Fairway. This is because it is undisputed that Fairway is not precluded from suing on the alleged Payment-Forbearance Agreement.

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Mr. Justice Voith"

I AGREE:

"The Honourable Justice Skolrood"