

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Draycor Construction Ltd. v. Mazzei  
Electric Ltd.*,  
2024 BCSC 1531

Date: 20240821  
Docket: S246926  
Registry: Victoria

Between:

**Draycor Construction Ltd. and McCallum Developments Inc.**

Petitioners

And:

**Mazzei Electric Ltd.**

Respondent

Before: The Honourable Mr. Justice A. Saunders

## Reasons for Judgment on Application for Stay of Proceedings

Counsel for the Petitioners:

J. Aiyadurai  
S. Foster

Counsel for the Respondent:

A. Schleichkorn

Place and Date of Hearing:

Victoria, B.C.  
August 14, 2024

Place and Date of Judgment:

Victoria, B.C.  
August 21, 2024

[1] In the within petition, the petitioners seek an order that a claim of lien filed by the respondent under the *Builders Lien Act*, S.B.C. 1997, c. 45 [BLA] (the “Lien”), which was cancelled by agreement upon the petitioner McCallum Developments Ltd. (“McCallum”) posting as security for the Lien the sum of \$391,870.68 (the “Security”) in the petitioners’ solicitors’ trust account, is extinguished, and that the Security be returned back to McCallum.

[2] The thrust of the petitioners’ claim is that s. 22 of the *BLA* provides that a lien claim is extinguished if the lien is not filed in the manner and within the time provided. The petitioners say the Lien was not filed within the time limits prescribed by s. 20. It is common ground that no certificate of completion on the subject development project was issued; hence, the time limit prescribed by s. 20(2) applies:

- (2) A claim of lien that is not governed by subsection (1) may be filed no later than 45 days after
  - (a) the head contract has been completed, abandoned or terminated, if the owner engaged a head contractor, or
  - (b) the improvement has been completed or abandoned, if paragraph (a) does not apply.

[3] The petitioners further rely on s. 25 of the *BLA*, which provides, *inter alia*, that an owner or contractor may apply at any time to the Court for cancellation of a claim of lien, which the Court may do if satisfied that the lien is extinguished under s. 22.

[4] On this application, the respondent seeks an order staying the petition under s. 7 of the *Arbitration Act*, S.B.C. 2020, c. 2:

**Stay of court proceedings**

7(1) If a party commences legal proceedings in a court in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before submitting the party's first response on the substance of the dispute, apply to that court to stay the legal proceedings.

(2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

(3) An arbitration may be commenced or continued and an arbitral award made even if an application has been brought under subsection (1) and the issue is pending before the court.

[5] The respondent contracted with the petitioner Draycor Construction Ltd. (“Draycor”), as trade contractor for McCallum, the owner of the subject lands, to provide electrical work and fixtures, under a standard form CCDC 17-Stipulated Price Contract between Owner and Trade Contractor for Construction Management Projects (the “Subcontract”). Part 8 to the Subcontract provides for dispute resolution. General Condition 8.1.1 sets out the scope of the dispute resolution provisions:

**Part 8 Dispute Resolution**

**GC 8.1 Authority of the Construction Manager and the Consultant**

8.1.1 Differences between the parties to the Contract as to the interpretation, application or administration of the Contract or any failure to agree where agreement between the parties is called for, herein collectively called disputes, which are not resolved in the first instance by findings.

[Emphasis added.]

[6] Part 8 then goes on to provide for successive means of dispute resolution: negotiation; mediation; and finally, under General Condition 8.2.6, arbitration:

8.2.6 By giving a Notice in Writing to the other party and the Construction Manager...either party may refer the dispute to be finally resolved by arbitration... .

[7] The respondent alleges that invoices it submitted to Draycor between November 30, 2023 and March 13, 2024 totalling \$246,275.52, and a further claim for additional expenses and costs due to delay in the amount of \$145,595.16, invoiced April 26, 2024, all remain unpaid. The respondent filed the Lien in respect of its claims for those unpaid amounts on April 26, 2024.

[8] By way of a letter agreement dated May 6, 2024, the parties agreed to the Lien being discharged on terms, including the funds in the full amount of the lien claim being held in trust by the petitioners’ solicitors as security, in substitution of the Lien, pending resolution of the lien claim (the “Discharge Agreement”).

[9] By way of letter dated May 17, 2024, the respondent invoked the dispute resolution provisions of Part 8 of the Subcontract. This petition seeking cancellation of the Lien claim was filed July 5, 2024.

[10] On this application, the respondents rely on the dicta of Mr. Justice Hinkson in *Gulf Canada Resources Ltd. v. Arochem International Ltd.*, 66 B.C.L.R. (2d) 113 (C.A.), 1992 CanLII 4033:

[39] Considering s. 8(1) [predecessor to the present s. 7(1)] in relation to the provisions of s. 16 and the jurisdiction conferred on the arbitral tribunal, in my opinion, it is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement because those are matters within the jurisdiction of the arbitral tribunal. Only where it is clear that the dispute is outside the terms of the arbitration agreement or that a party is not a party to the arbitration agreement or that the application is out of time should the court reach any final determination in respect of such matters on an application for a stay of proceedings.

[40] Where it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then, in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal.

[11] The respondents further cite the decision of Madam Justice Saunders in *Sandbar Construction Ltd. v. Pacific Parkland Properties Inc.*, 66 B.C.L.R. (2d) 225, 1992 CanLII 429 (S.C.), a case in which it was held that a stay of proceedings should be granted even where the lien arguably fell outside the issues to be arbitrated, and even though there was doubt as to whether the entirety of the lien claim fell within the terms of the contract. Applying a purposive test of fostering the viability of arbitration, Saunders J. considered that the builders lien claim arose out of monies owing under the contract, and non-payment under it. She said at 233:

The amounts owing to the plaintiff under the contract, if any, is a matter which may be dealt with by arbitration. Although the remedy available in a builders lien action is different from the remedies that may be provided by an arbitrator, an arbitration finding that there is no sum owing for work done under the contract will resolve the issue of the lien in this action. Alternatively, an arbitration award of damages under the construction contract will leave for this court the question of how much, if any, of that amount may be secured by a builders lien. Generally the sums that may be secured by a builders lien will

be a subset of the sums that may be found owing to a plaintiff through the arbitration process.

[12] On that basis, Saunders J. concluded,

... that this action is sufficiently connected to issues in the arbitration that it can be said to be a matter agreed to be submitted to arbitration.

[13] The respondents say that likewise, it is arguable that the dispute raised by the petition—that is, whether the Lien was filed on time—is sufficiently connected to the issues of contractual liability that will be the subject of arbitration, that the dispute can be said to be a matter agreed to be submitted to arbitration.

[14] The petitioners, however, say that the narrow question of whether the lien claim is extinguished is a matter that, having been made the subject of a petition to this Court, cannot now proceed to arbitration, as a matter of law. The petitioners point to s. 42(2) of the *BLA*, which provides:

An agreement that this *Act* is not to apply, or that the remedies provided by it are not to be available for a person's benefit, is void.

Section 25 of the *BLA* grants owners the remedy of applying “at any time” to this Court to have a claim of lien cancelled on the basis that the lien is extinguished. To the extent that the dispute resolution provisions of the Subcontract might entitle the respondents to a stay of the petition in order to arbitrate, it is submitted that the Subcontract must be considered as void. The petitioners submit that if the Lien is determined by this Court to be extinguished, the respondent will be free to continue to arbitrate its *in personam* claims under the Subcontract. They say, however, that the matter of the Lien’s status must first be determined by the Court in accordance with s. 25, as that is a statutory remedy specifically provided for.

[15] The petitioners further point to a term of the Discharge Agreement that explicitly preserved their s. 25 rights:

Nothing in this lien security arrangement will affect the rights of Draycor or McCallum to claim that the Lien is improper or defective, or will otherwise affect any of the rights of Draycor or McCallum under the *Builders Lien Act*, including the right to make application to the Supreme Court of British Columbia relating the further disposition of the Cash Security.

The petitioners say that the respondent's stay application flies in the face of this provision, which the respondent agreed to.

[16] The threshold question on this application is whether the petition, in which the petitioners seek both determination of whether the Lien was filed on time, and a statutory remedy, i.e. cancellation of the Lien, are "in respect of a matter agreed to be submitted to arbitration". Under GC 8.1.1., the matters that Draycor and Mazzei agreed to submit to arbitration are differences as to the interpretation, application or administration of the Subcontract.

[17] A contest as to an arbitrator's jurisdiction over a dispute is properly resolved by the arbitrator, if the contest arises out of questions of fact, or questions of mixed fact and law where the question of fact requires more than superficial consideration of the evidence: *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, per Binnie J. at paras. 28–29; *McMillan v. McMillan*, 2016 BCCA 441 at paras. 27–28. No deference to an arbitration agreement is owed when the contest over the arbitrator's jurisdiction arises purely out of a question of law.

[18] The narrowness of the issues to be determined in the petition however distinguishes the present case from those situations in which the legal proceedings sought to be stayed raise general issues of fact, or mixed fact and law, relevant to the parties' contractual liabilities. Here, the Subcontract will only be relevant to the petition in as much as it provides context to the Lien claim. The Subcontract's terms are not relevant to the bases on which the petitioners seek the Lien's cancellation. The petition will, under s. 20(2) of the *BLA*, turn on the date the Lien was filed relative to either the date on which the head contract was been completed, abandoned or terminated, or the date on which the improvement—"improvement" being defined in the *BLA* so as to involve the entirety of the petitioners' development of the property, not only the work under the Subcontract—was completed or abandoned. Determination of those dates involves questions of performance or substantial completion not of the Subcontract, but of the head contract or the improvement as a whole. These are not arguable factual issues that concern

interpretation, application or administration of the Subcontract. Further, the basis on which the petitioners seek cancellation of the Lien claim arises solely out of operation of the *BLA*, not the Subcontract. As a question of law, I find all these matters are well outside the scope of the Subcontract’s dispute resolution provisions.

[19] The petition is not in respect of a matter agreed to be submitted to arbitration. The application for a stay of proceedings is therefore dismissed. The petitioners will have their costs of this application, as costs in the cause.

“A. Saunders J.”