In the Court of Appeal of Alberta

Citation: Chandos Construction Ltd v Deloitte Restructuring Inc, 2024 ABCA 403

Date: 20241211
Docket: 2303-0142AC
Registry: Edmonton

Between:

Chandos Construction Ltd

Respondent
(Applicant)

- and -

Deloitte Restructuring Inc in its capacity as Licensed Insolvency Trustee of the Estate of Capital Steel Inc and not in its Personal Capacity

Appellant
(Respondent)

The Court:

The Honourable Justice Frans Slatter
The Honourable Justice April Grosse
The Honourable Justice Joshua B. Hawkes

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice P. Michalyshyn
Dated the 8th day of June, 2023
Filed on the 7th day of July, 2023
(2023 ABKB 349, Docket: 1603 19909)

Memorandum of Judgment

The Court:

[1] The issue arising in these overlapping bankruptcy and builders' lien proceedings is whether the insolvent lien claimant is barred from enforcing its lien by the expiry of the limitation period. A Master in Chambers concluded that Deloitte Restructuring, the trustee of the insolvent Capital Steel Inc., had not commenced proceedings for a remedial order within the limitation period, and could no longer enforce the lien: ***Chandos Construction Ltd v Capital Steel Inc (Trustee of)***, 2022 ABQB 78, 83 CPC (8th) 121. That decision was affirmed on appeal, although for different reasons: ***Chandos Construction Ltd v Deloitte Restructuring Inc***, 2023 ABKB 349. The trustee appeals further.

Facts

[2] Capital Steel was a subcontractor to Chandos Construction on a project in St. Albert. Capital Steel filed an assignment into bankruptcy on September 26, 2016, and Deloitte Restructuring was appointed as the trustee. The bankruptcy docket number is 24-2169632.

[3] On October 26, 2016, Deloitte, on behalf of the Capital Steel estate, filed a builder's lien in the amount of $150,720.58. On November 8, 2016 the parties agreed to a consent order discharging the lien on payment into court of $165,801.44. The applicant named in the order was Chandos, and the respondent was Deloitte, as trustee of the Capital Steel estate.

[4] The order read:

1. This Order shall be filed as the Originating pleading in this Action.

2. The applicant is granted leave to pay into this Honourable Court the amount of $165,801.44. . . .

3. The Registrar of the Northern Alberta Land Registration District shall [discharge the lien on payment into court].

4. Any interested party may apply to this Honourable Court to:

    (a) dispute the validity and amount of the Lien;

    (b) dispute the liability of the Applicant to the Respondent;

    (c) determine a lesser amount of the Security or to set the lien fund; or

(d) set off any amount against the Security where set off is otherwise permitted by law.

5. The determination of the issues between the parties is adjourned *sine die*.

When the consent order was filed the "Action" it started was given docket number 1603-19909, and the lien was discharged on payment in.

[5] At this point the focus of the litigation shifted, and the lien issues became secondary. A disagreement existed over the amount of money that Chandos might owe to Capital Steel, centred in large part on the enforceability of this clause in the subcontract:

> Q. In the event that the Subcontractor commits any act of insolvency, bankruptcy, winding up or other distribution of assets or permits a receiver of the Subcontractor's business to be appointed, or ceases to carry on business or closes down its operations, then in any such event: . . .
>
> > (d) The Subcontractor shall forfeit 10% of the within Subcontract Agreement price to the Contractor as a fee for the inconvenience of completing the work using alternate means and/or for monitoring the work during the warranty period.

Deloitte took the view that this clause was unenforceable, as it violated the anti-deprivation rule in bankruptcy. If the clause was enforceable, it might mean that the amount owed by Chandos to Capital Steel, and thus the amount protected by the lien, was *de minimis* or even "nil".

[6] On March 6, 2017 Deloitte brought an application in the bankruptcy proceedings:

> The Trustee seeks advice and directions as to whether Chandos is entitled to rely on ss. Q(d) of the Subcontract between it and Capital Steel and, if not, for a direction that the balance [of funds paid into court, net of completion costs] of $126,818.39 is payable to the Trustee.

The application proceeded based on a Statement of Agreed Facts. On March 17, 2017, a chambers judge found that clause Q(d) was enforceable, but in reasons issued on January 29, 2019 this Court reversed that decision and found that the clause was unenforceable: ***Capital Steel Inc (Trustee of) v Chandos Construction Ltd***, 2019 ABCA 32, 438 DLR (4th) 195. That conclusion was confirmed by the Supreme Court of Canada on October 2, 2020: ***Chandos Construction Ltd v Deloitte Restructuring Inc***, 2020 SCC 25, [2020] 3 SCR 3. While these decisions confirmed that clause Q(d) was void, they did not rule on the rights to the funds in court.

[7] On May 18, 2021 Deloitte filed an application in the bankruptcy proceedings seeking an accounting from Chandos of the estimated costs to complete and the value of outstanding warranty

items. Chandos argued that this issue should be determined in the lien proceedings commenced by the consent order, and the judge hearing that bankruptcy application directed that it be heard by a Master in Chambers.

[8] Accordingly, on September 14, 2021 Deloitte filed an application in the lien action #1603-19909 seeking a declaration that the lien was valid, and payment of the funds in court to it as trustee. On September 15, 2021 Chandos filed a cross-application seeking the return to it of some or all of the funds that had been paid into court almost five years earlier. The cross-application recited the outcome of the litigation over the validity of clause Q(d), and continued:

> 9. At no time has the Trustee issued and served a Statement of Claim on Chandos to either enforce the builder's lien or collect the account receivable from Chandos.

Chandos argued that since the limitation period had expired, it was entitled to a return of the money in court.

[9] The two applications first came before a Master in Chambers, who held (2022 ABQB 78) that Deloitte's application to declare the lien valid was brought after the expiration of the limitation period. While proceedings to enforce the lien could have been commenced under the consent order that discharged the lien upon payment of funds into court, that had never been done.

[10] Deloitte's appeal to a judge in chambers was dismissed: 2023 ABKB 349. The chambers judge held that in the circumstances the filing of a statement of claim within the limitation period was necessary, and since that had never been done the claim of the Capital Steel estate was barred. Given this conclusion, it was not necessary to decide exactly when the limitation period started to run. Chandos was accordingly entitled to the funds in court.

Issues

[11] On appeal, Deloitte raises the following issues:

a) Whether s. 3(1) of the *Limitations Act*, RSA 2000, c. L-12 was correctly applied.

b) Whether the filing and service of a statement of claim is a necessary step under s. 49 of the *Builders' Lien Act*.[1]

c) Whether the claim of the Capital Steel estate was barred by the expiration of the limitation period.

[1] The lien was filed on October 26, 2016 under the *Builders' Lien Act*, RSA 2000, c. B-7, which was significantly amended and renamed the *Prompt Payment and Construction Lien Act*, RSA 2000, c. P-26.4, in force August 29, 2022. The amendments do not affect the outcome of this appeal.

Deloitte argues that the limitation period did not even start to run until, at least, the decision of the Court of Appeal on January 19, 2019, however the "Action" started by the consent order of November 8, 2016 could qualify as a claim for a remedial order. Alternatively it argues that the application brought in the bankruptcy proceedings on March 6, 2017 for a ruling on the validity of clause Q(d), which also asked for "a direction that the balance of $126,818.39 is payable to the Trustee" was such a proceeding. Chandos argues that neither of these proceedings were effective claims for a remedial order, and that the trustee had to issue a third claim to satisfy the *Limitations Act*.

The Limitations Regime

[12] Section 43 of the *Builders' Lien Act* provides that a lien "ceases to exist" unless within 180 days of registration "an action is commenced under this Act" to realize on the lien. However, where funds are paid into court as security in place of the lien, s. 44 provides that the limitation period in s. 43 does not apply. Instead, the general limitation period in the *Limitations Act* comes into play: *Limitations Act*, s. 2(3) and (4).

[13] Section 3(1) of the *Limitations Act* provides that a defendant is entitled to immunity from a claim unless a proceeding claiming a remedial order is commenced within:

> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> > (i) that the injury for which the claimant seeks a remedial order had occurred,
> >
> > (ii) that the injury was attributable to conduct of the defendant, and
> >
> > (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
>
> or
>
> (b) 10 years after the claim arose.

In this case the dates of satisfaction of the first two components of the test are clear. The Capital Steel estate knew of its "injury", that is the amounts potentially unpaid on its subcontract, no later than the date it filed its lien. It also knew that Chandos was the party to whom that injury was attributable. The remaining issue was when the injury, assuming liability, warranted bringing a proceeding.

[14] Deloitte argues that the Capital Steel estate did not know whether proceedings were justified until after the decision of the Supreme Court of Canada on the enforceability of clause

Q(d), or possibly after the earlier decision of the Court of Appeal. The first thing to note, however, is that commencement of the limitation period does not depend on the plaintiff's assurance or belief that the claim will ultimately be successful. Section 3(1)(a)(iii) specifically states that it assumes "liability on the part of the defendant". The dispute or uncertainty about the enforceability of clause Q(d) did not, accordingly, delay commencement of the limitation period until that issue was resolved: ***Weir-Jones Technical Services Inc v Purolator Courier Ltd***, 2019 ABCA 49 at para. 58, 86 Alta LR (6th) 240.

[15] Deloitte also argues that proceedings are not "warranted" until the claimant can reasonably predict that the claim is not negligible or *de minimis*. In this case, however, the uncertainty about the viability of the claim depended on a question of law, namely the enforceability of clause Q(d). The limitation statutes are triggered by discoverability of facts, not knowledge about questions of law: ***HOOPP Realty Inc v Emery Jamieson LLP***, 2020 ABCA 159 at para. 57, 5 Alta LR (7th) 213. The quantum of the claim, being the money paid into court, was well known assuming "liability on the part of the defendant".

[16] Deloitte further argues that the exact amount owed by Chandos to Capital Steel was not known until later, likely some time after the decision of the Supreme Court of Canada. It points out that completion costs, deficiency costs, warranty costs, and other possible setoffs were not yet known.[2] However, it is not necessary for the quantum of the claim to be crystallized before the limitation period starts to run: ***Grant Thornton LLP v New Brunswick***, 2021 SCC 31 at para. 46, [2021] 2 SCR 704; ***Peixeiro v Haberman***, [1997] 3 SCR 549 at para. 18; ***Hamilton (City) v Metcalfe & Mansfield Capital Corp***, 2012 ONCA 156 at paras. 59-69, 347 DLR (4th) 657. Again, the only thing that is required is that the potential claim, assuming liability on the part of the defendant, "warrants bringing a proceeding". On that issue the proof is in the pudding: the fact that the parties litigated the validity of clause Q(d) all the way to the Supreme Court of Canada discloses that the potential claim of approximately $150,000 warranted proceedings. The exact quantum of the claim may have been contingent and uncertain, but it was still worth pursuing, assuming liability on the part of Chandos.

[17] In the Statement of Agreed Facts used in the bankruptcy proceedings to decide the validity of clause Q(d), the parties optimistically stated that once the validity of the clause was determined, they would "be able to resolve all monetary issues between them". Settlement is always an option for any claim, but it does not have the effect of delaying the start of or extending the limitation period: ***Weir-Jones*** at para. 57. To the extent that this expression of optimism is a "fact", it does not affect when proceedings were warranted and has no bearing on the outcome of this appeal. Chandos would be entitled to "immunity from the claim" upon expiry of the limitation period,

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[2] As the parties noted in the trial court, finalizing the quantum of the claim would be necessary to wind up the bankrupt estate, but it does not have an effect on the commencement of the limitation period.

regardless of the prospect, success, or failure of any settlement discussions. Further, this expression of optimism cannot be regarded as a waiver of rights.

[18] It follows that in this case the limitation period started to run no later than the date that the lien was filed, October 26, 2016. At that point the Capital Steel estate knew that it had suffered an injury attributable to Chandos, and that, assuming liability of Chandos, proceedings were warranted. The Capital Steel estate accordingly had to seek a remedial order no later than October 26, 2018. As noted, Deloitte argues the "Action" started by the consent order of November 8, 2016 could qualify as a claim for a remedial order. It also argues that the application brought in the bankruptcy proceedings on March 6, 2017 for a ruling on the validity of clause Q(d), which also asked for "a direction that the balance of $126,818.39 is payable to the Trustee" was such a proceeding.

Seeking Remedial Orders in Lien Proceedings

[19] Chandos argues that the "Action" started by the consent order is not an effective way to seek a remedial order because of s. 49 of the *Act*:

> 49(1) Proceedings to enforce a lien shall be commenced by a statement of claim.

The chambers of judge relied on this provision to find that the Capital Steel estate had not commenced an effective claim for a remedial order. Since no action had been commenced by statement of claim, its claim was barred by expiration of the limitation period.

[20] The *Act* contemplates that in the ordinary course when the lien is discharged by posting security two parallel proceedings will result. There will be one proceeding, usually started by originating application, to discharge the lien. If the parties cannot resolve their issues there will be a second action to interpret and enforce the lien, usually commenced by statement of claim as contemplated by s. 49. As will be seen (*infra*, paras. 25-26) the template order published by the Court (particularly clause 6(c) thereof) may contemplate that these two proceedings might sometimes be combined into one. In this case it appears an attempt was made to do that by the terms of the consent order. This appeal concerns whether the procedure followed here was legally adequate, not whether it is desirable.

[21] The wording of s. 49 is mandatory in nature, but that does not mean that noncompliance is a fatal error, as opposed to a curable irregularity. The idea that procedural errors create "nullities" has been rejected for many years. The point was eloquently made in ***Bridgeland Riverside Community Ass'n v Calgary (City)***, 1982 ABCA 138 at paras. 27-28, 19 Alta LR (2d) 361, 37 AR 26:

> 27 In my view, no concept is more sterile than that which says that a proceeding is a nullity for failure of compliance with a procedural rule and without regard to the effect of the failure. . . .

> 28 I would put aside the debate over void or voidable, irregularity or nullity, mandatory or directory, preliminary or collateral. These are only ways to express the question: Shall or shall not a procedural defect (whether mandated by statute or common law) vitiate a proceeding? In my view, absent an express statutory statement of effect, no defect should vitiate a proceeding unless, as a result of it, some real possibility of prejudice to the attacking party is shown, or unless the procedure was so dramatically devoid of the appearance of fairness that the administration of justice is brought into disrepute.

Under the modern approach to procedural defects, the focus should be on whether any incurable prejudice arises from the defect. The defendant usually suffers no substantive prejudice from a failure to commence a proceeding by one form as opposed to another. The defendant clearly has notice of the claim within the limitation period, and holding otherwise is artificial.

[22] In ***Stout Estate v Golinowski Estate***, 2002 ABCA 49, 100 Alta LR (3d) 5, 299 AR 13, an administrator *ad litem* was appointed by court order for the plaintiff estate, and she issued a statement of claim. The defendant moved to strike the claim, on the basis that an administrator *ad litem* could only defend a claim, not commence a claim. The claim was said to be a "nullity", and the subsequently appointed administrator of the estate could not be substituted as the plaintiff. This Court rejected this argument, and the underlying concept of "nullities": see paras. 76-82. Quoting with approval from the earlier five judge decision in ***Frank v King Estate*** (1987), 56 Alta LR (2d) 289 at pp. 300-301, 88 AR 241, the Court repeated:

> I agree with the argument of Frank's counsel that there was a personal representative who could be substituted but would prefer to say that an action against the estate of a deceased person should no longer be characterized as a nullity. It is, in my view, in keeping with current legislation and the principle that ought to be applied, that the court, in deciding whether to add or substitute a party to an action, ought not concern itself with whether the action is a "nullity", but whether the amendment results in prejudice, bearing in mind express limitation periods and the principles behind them . . .
>
> This is not to deny the existence of error nor to say that error is always curable. Moreover, error is often attributable to lack of care and we do not encourage carelessness. I will return to that point in disposing of the costs of these appeals. Error, however, must [not] be compounded into injustice and the almost invariable result of characterizing proceedings as a nullity with automatic consequences tends to that end . . .

Since the administrator *ad litem* had been appointed by court order for the very purpose of commencing the action, what was done could not be characterized as a nullity. In this appeal the consent order of November 8, 2016, while unorthodox, should be read as explicitly commencing

lien enforcement proceedings along with providing for the payment of money into court to remove the lien.

[23] The *Rules of Court* recognize that procedural errors will occur and enable their cure if there is no irremediable prejudice: R. 1.5(4). A specific rule applies to what happened here:

> 3.2(6) If an action that is started in one form should have been started or should continue in another, the Court may make any procedural order to correct and continue the proceeding and deal with any related matter.

On the assumption that commencing the lien enforcement action by the "Action" authorized by the consent order was an irregularity, it can be cured under this rule, which was not drawn to the attention of the chambers judge. Rule 3.2(6) undoubtedly engages a level of discretion, but as ***Stout Estate*** implied, since Chandos consented to commencing the lien action through the "Action" as recited in the consent order, it can hardly now object to curing any irregularity.

[24] Rules enabling the curing of irregularities in commencement of the proceedings have been applied in other cases. In ***Gittings v Caneco Audio-Publishers Inc.*** (1988), 26 BCLR (2d) 349 (CA), 1988 CanLII 2832 the statute required that proceedings be commenced by petition, but the Court of Appeal held that in the absence of any prejudice having commenced the proceedings by statement of claim was a curable irregularity. To the same effect are ***Trudeau v Devost***, [1942] SCR 257, [1942] 4 DLR 420; ***Clancey v Clarke Transport Canada Inc*** (1998), 160 DLR (4th) 621 at paras. 34-35, 1998 CanLII 18103 and ***Tomic v Tough,*** 2013 BCCA 355 at paras. 18-19, 341 BCAC 152.

[25] The chambers judge noted:

> [12] The parties agreed there may be circumstances when by agreement and/or order the s. 49 requirement is unnecessary.

This, if nothing else, appears to be a concession that failure to comply with s. 49 does not render the proceedings a "nullity". In particular, it was noted that the Court of King's Bench now publishes a "template order" that can be used when a lien is discharged by the posting of security.[3] The form of template order provided to the chambers judge read:

> 6. Without prejudice to any party's right to seek other applicable remedies under the *Builders' Lien Act*, the Lien Claimant (or Lien Claimants) shall, not later than 180 days following the date of the registration of the applicable Lien with the [REGISTRAR OF LAND TITLES and/or MINISTER OF ENERGY], either:

[3] It appears the template order was first published in 2017 after the consent order in this case was granted.

> (a) commence a separate court action to enforce the Lien;
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> (b) commence a separate court action to preserve remedies under the *Builders' Lien Act* and commence arbitration proceedings where the agreement between the parties authorizes or requires such proceedings; or
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> (c) if authorized by separate Court Order, file a "statement of the plaintiff's claim" in these proceedings,
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> (collectively, the "Lien Enforcement Proceedings"), failing which the Lien shall cease to exist.

The chambers judge held, however, that the consent order was not substantially similar to the template order.

[26] Even though it only reflects practice and is not a source of law, if a lien claimant was to make use of the template order published by the Court itself, that procedure could hardly be described as a "nullity", even though it appears to contemplate that in some circumstances the lien might be enforced otherwise than by issuing a statement of claim.[4] While it does not explicitly say so, the template order appears to contemplate that it will be issued in an existing proceeding, as it does not deem itself to be a commencement document like the consent order in this appeal. The commencement document under which the template order is granted could be a statement of claim, or perhaps more often an originating application seeking substitution of security for the lien. If the original commencement document was a statement of claim, there would be no obvious reason to require a "statement of the plaintiff's claim" as provided for in clause 6(c) of the order. This provision of the order therefore appears to contemplate that lien enforcement proceedings could be commenced by a document other than a statement of claim, notwithstanding the requirement in s. 49 that "Proceedings to enforce a lien shall be commenced by a statement of claim". As noted, the parties conceded this was possible.

[27] The chambers judge held, however, that the subsequent publication of this template order did not assist the Capital Steel estate, because it had never issued a "statement of its claim": reasons at para. 14. However, a "statement of the plaintiff's claim" contemplated by clause 6(c) of the template order is not a commencement document like a "statement of claim", and this aspect of the template order is not of significance in deciding this appeal. To illustrate, sometimes

[4] There are several interesting aspects of the template order, including that it imposes a 180 day deadline on taking further steps. As noted, s. 44 of the *Act* provides that the 180 day limitation period in s. 43 does not apply when the lien is discharged by posting security, but there is no reason why the court cannot make a procedural order setting a deadline within which steps must be taken. A consent order is still an order of the court, not a contract. The equivalent time limitation in the order can, unlike the limitation period in the statute, be extended by the court: R. 13.5(2).

proceedings commenced by originating application turn out to be too complex for that procedure, engaging R. 3.12:

> 3.12 At any time in an action started by originating application the Court may, on application, direct that all or any rules applying to an action started by statement of claim apply to the action started by originating application.

If the pleadings (first represented by the originating application) require further detail, that is accomplished by having the applicant file a "statement of the claim", as a supplemental pleading adding further particulars to those found in the originating application, which was the "commencement document". The "statement of the plaintiff's claim", however, is not a new commencement document. See for example ***Singh v Kaler***, 2017 ABCA 275 at paras. 66-69, 56 Alta LR (6th) 256; and ***A.J.G. v Alberta***, 2006 ABQB 446 at para. 3, 402 AR 340. The absence of a "statement of the claim" in these proceedings (here started by the consent order) is accordingly not fatal; if further particulars of the claim are required, the appropriate remedy would be to grant a procedural order that the Capital Steel estate file such a pleading.

[28] The appellant referred to ***Driden Industries Ltd v Sieber***, 1974 Alta SCAD 14 at paras. 11-13, [1974] 3 WWR 386 which noted that (at that time) there was a procedural gap in the statute when the lien was discharged by payment of security. That gap was partly filled in 1985 by the addition of what are now s. 44 and 45. The template order includes the kind of procedural directions contemplated by ***Driden***. However (as noted by the chambers judge), neither the 1985 amendments nor the template order explicitly displace the requirement in s. 49 that enforcement of a lien is to be by "statement of claim". ***Driden*** is of little assistance in resolving this appeal.

[29] While admittedly unorthodox, the consent order specified that it would be the commencement document for the lien enforcement action. To repeat, the order provided:

> 4. Any interested party may apply to this Honourable Court to:
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> (a) dispute the validity and amount of the Lien;
>
> (b) dispute the liability of the Applicant to the Respondent;
>
> (c) determine a lesser amount of the Security or to set the lien fund; or
>
> (d) set off any amount against the Security where set off is otherwise permitted by law.
>
> 5. The determination of the issues between the parties is adjourned *sine die*.

The parties thus consented that this order would be the commencement document in the lien enforcement proceedings and Chandos argued in the bankruptcy proceedings that this was the correct proceeding in which to litigate the lien enforcement issues. Particulars could have been provided to the extent that they were needed, but after the trustee filed the affidavit proving the lien, further particulars were likely unnecessary.

[30] What was required by the *Limitations Act* was a proceeding in which Deloitte, as trustee of the Capital Steel estate sought a remedial order. As noted, in the consent order that was used as the commencement document the applicant named was Chandos, and the respondent was Deloitte as trustee of the Capital Steel estate. However, the consent order provided that "any interested party" could dispute the validity of the lien and the liability of the parties, functionally making the consent order a proceeding in which Deloitte sought a remedial order. Clause 4(b) of the consent order specifically provided that the "liability of the Applicant [Chandos] to the Respondent [Capital Steel estate]" would be determined by that procedure, which was the functional equivalent of a counterclaim. If a further "statement of the counterclaim" was required one could have been ordered, but there was no uncertainty about what the Capital Steel estate was claiming.

[31] In short, the provisions of the consent order went beyond just substituting security for the lien against the property, and contemplated resolution in the action it started of all issues respecting the validity and quantum of the lien. If any further procedural orders were required to effectively resolve the rights of the parties under the lien, they could be given under R. 3.2(6) and 4.9, unless Chandos can demonstrate prejudice.

[32] It follows that the consent order was effectively a proceeding for a remedial order that satisfied the requirements of the *Limitations Act*. The use of an order to commence the action, rather than a statement of claim, was at most a procedural irregularity but not a nullity. The claim of the Capital Steel estate is not barred by the passage of time. The problems created in this case by the unorthodox procedure set out in and resulting from the consent order can obviously be avoided in future by use of the template order published by the Court.

[33] Given that conclusion, it is not necessary to decide if the application brought in the bankruptcy proceedings on March 6, 2017 would also have qualified as a proceeding seeking a remedial order.[5] It is worth remembering, however, that there is no such tribunal as a "Bankruptcy Court" in Alberta: ***PricewaterhouseCoopers Inc v Perpetual Energy Inc***, 2021 ABCA 16 at para. 184, 20 Alta LR (7th) 23. Cases like ***Sigurdson v Fidelity Insurance Co. of Canada*** (1980), 110 DLR (3d) 491, 20 BCLR 345 (CA) confirm that there are bankruptcy procedures, not a bankruptcy court: ***Perpetual Energy*** at paras. 190-91. All the judges of the Court of King's Bench can exercise their civil and bankruptcy jurisdiction at any time, concurrently, in any courtroom. Under R. 6.11(1)(f) evidence in one type of proceeding can be considered in the other. A judge supervising a bankruptcy proceeding has considerable flexibility in setting the procedure to be used to

[5] The *Limitations Act* does not define what procedure is sufficient to "seek a remedial order".

determine the rights of any creditor in the bankruptcy. That happened here, for example, when the judge hearing the bankruptcy proceedings directed that the dispute over the funds posted as security for the lien be determined first by a Master. There is accordingly no jurisdictional impediment to lien rights being determined by a judge assigned to supervise a bankruptcy.

Conclusion

[34] In conclusion, the appeal is allowed. The matter is remitted back to the trial court for determination of the quantum of the Capital Steel estate's claim, and its entitlement to the funds. If necessary either party may seek procedural direction from that court. If so advised, Deloitte Restructuring may seek an order under R. 3.2(6) remedying the form of its pleadings.

Appeal heard on November 28, 2024

Memorandum filed at Edmonton, Alberta
this 11th day of December, 2024

Slatter J.A.

Authorized to sign for: Grosse J.A.

Authorized to sign for: Hawkes J.A.

Appearances:

B. Angove
for the Respondent

S.J. Weatherill
for the Appellant