ONTARIO
SUPERIOR COURT OF JUSTICE
In the matter of a reference under the *Construction Lien Act*, R.S.O. 1990, c. C.30 as amended
And in the matter of R. 54, Ontario Rules of Civil Procedure

DUNCAN W. GLAHOLT, Referee
Date: **11 August 2016**
File: 13-10362-00CL
Title: **In the Matter of a Plan of Compromise or Arrangement of Silver Streams Homes Inc., Silver Streams Homes (Puccini) Inc., 2148993 Ontario Inc., 2147681 Ontario Inc. and 2147650 Ontario Inc.**

REASONS
11 August 2016

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[1] Although the principal relief sought in this matter was resolved on consent, there were a number of procedural matters of note, and a ruling required on the claims advanced by Argo Lumber Inc. and Newmar Window Manufacturing Inc. for interest and costs. I propose to deal with these matters in these reasons.

Parties

[2] The following parties either settled during the period prior to hearing, or failed to attend at the hearing, as indicated below:

a. All claims against Home Trust Company were dismissed on consent without costs by Order dated 29 June 2015;

b. All claims by Trudel & Sons Roofing were dismissed on consent without costs by Order dated 29 June 2015;

c. All claims against Foremost Mortgage Holding Corporation were dismissed on consent without costs by Order dated 9 September 2015;

d. Counsel for Renova Recycling (2000) Inc. did not attend the first three procedural conference calls and advised on September 3, 2015 that they had obtained a consent order removing them as counsel of record for Renova Recycling (2000) Inc. The Order is that of Justice G.P. Di Tomaso issued at Newmarket on 19 August 2015. New counsel did not appear on the record for Renova Recycling

(2000) Inc. nor did it file a notice of intention to act in person, as required by Justice De Tomaso's the Order.

e. Argyle Hardwood & Flooring Ltd. had no claim for lien and brought a motion for personal judgment returnable at the hearing which went unopposed;

f. Books of Evidence required by Procedural Order No. 1 dated 9 February 2015 were not filed by King-Con Corporation, 669857 Ontario Inc. o/a Alma Mechanical or Paris Kitchens a division of the Sanderson-Harold Company Ltd.

g. No Book of Evidence was filed by the Bank of Montreal.

Issues resolved on consent

[3] The hearing commenced on 11 July 2016. We adjourned on consent that day, and day-by-day over the following three days, to permit the parties to negotiate a resolution of this matter.

[4] All issues eventually settled except for the claims of Argo Lumber and Newmar Window for personal judgment for interest and costs, and the claim of the Bank of Montreal for costs, both of which matters are referenced below.

[5] Lawyers for the following parties attending before me on 14 July 2016 filed the following consents, in the following order, each of which attached a form of procedural order providing for an agreement as to timeliness, lienability and quantum, priority over all mortgages, the value of holdback deficiency pertaining to that lien (or liens) and that except as included in the lien amount, there would be no further costs awarded:

a. Consent by the Labourers' Union of North America Local 183 Members' Benefit Trust Fund and Puccini Mortgage Corp., 53 Puccini Mortgage Corp., 388242 Ontario Limited; Dapaul Management Limited and Nastell Investments Limited (hereafter "the Private Mortgagees"), and Bank of Montreal, dated 8 July 2016;

b. Consent by Paris Kitchens a division of The Sanderson-Harold Company Limited and the Private Mortgagees and Bank of Montreal, dated 8 July 2016;

c. Consent by Con-Drain Company (1983) Limited and the Private Mortgagees and the Bank of Montreal, dated 8 and 9 July 2016;

d. Consent by Argo Lumber Inc. and Newmar Window Manufacturing Inc., the Private Mortgagees, and Bank of Montreal, dated 11 July 2016;

e. Consent by King-Con Construction, 669857 Ontario Inc. o/a Alma Mechanical, Cardell Flooring Limited, Foremont Drywall Inc. et al., Solo Electric Limited, 1865721 Ontario Inc., GM Exterior Inc., the Private Mortgagees, Castle Lane Design Group (Jack Greenberg) and the Bank of Montreal, undated;

f. Consent by Pilbro III Inc., Medi Group Incorporated, Canadian Concrete Forming Limited, Pave Plumbing & Heating Inc., E.D. Carpenters Limited, Giancola Aluminum Contractors Inc., the Private Mortgagees, Castle Lane Design Group (Jack Greenberg) and the Bank of Montreal, dated 12 July 2016;

g. Consent by 669857 Ontario Inc. o/a Alma Mechanical and the Private Mortgagees and Bank of Montreal, undated, but referencing paragraph 5 of an attached draft Procedural Order which states that it is "the last Claim for Lien to be dealt with in this Reference."

h. Consent by the Private Mortgagees and the Bank of Montreal, dated 13 July 2016, including a procedural calendar for the determination of the costs of the Bank of Montreal on this Reference, such costs, once determined by me, to be paid to the Bank of Montreal prior to any monies being paid to the Private Mortgagees; this procedural calendar provides that by 15 August 2016 the Bank of Montreal is to provide to the lawyers for the Private Mortgagees copies of all accounts rendered to the bank, a Bill of Costs, the dockets for the lawyers involved, and invoices/receipts for disbursements claimed; the bank is to get paid the amount claimed in exchange for discharging its mortgage on Lot 18, M-Plan 65M4331, subject to reimbursing the Private Mortgagees any difference between that amount and the amount I award following a half day hearing no later than 15 September 2016;

[6] The idea appears to have been to have the first group of Lien Claimants referenced in paragraph 5, subparagraphs (a) through (f) above, consent to the value of their lien, inclusive of lienable costs and interest (non-lienable) and a corresponding amount as "Holdback Deficiency", all of which was to be paid in first priority from funds currently held by the Monitor, and then, with those liens disposed of, have the last Lien Claimant standing, 669857 Ontario Inc. o/a Alma Mechanical, (g) above consent to the following relief:

a. Finding that the individual Private Mortgagees were owed the aggregate sum of $11,960,703.22, broken down as per Schedule A to that consent;

b. Directing that the balance of the "Fund" held by the Monitor, after paying the Lien Claimants as per their consents pursuant to what were intended to be individual procedural orders, and after then having paid the Bank of Montreal a sum to be determined within this Reference pursuant to a form of Direction attached as Schedule B to that consent, be paid to "Jack Greenberg, in trust, on behalf of the Defendants Puccini Mortgage Corp., 53 Puccini Mortgage Corp., 388242 Ontario Limited, Nastell Investments Limited and Castle Lane Design Group (the direction in this regard is signed by Jack Greenberg on behalf of Castle Lane Design Group).

[7] I did not agree to issue individual procedural orders as requested. In my view the relief sought on consent was substantive and had to be dealt with by "Report/Award" (I adopt this term from the judgment of reference).

[8] Based on the consents filed, therefore, I prepared a draft Partial Report/Award which I circulated to counsel on 19 July 2016. I received responses on behalf of Newmar Window Manufacturing Inc. and Argo Lumber Inc. on 19 and 29 July 2016; on behalf the Medi Group of Lien Claimants on July 20; on behalf of the Private Mortgagees on 20, 21 and 25 July and 2 August 2016; and on 27 July 2016 again on behalf of the Medi Group of Lien Claimants. I also solicited information on 4 August 2016 and received replies from counsel on 5 August 2016.

[9] Apart from the purely administrative matters raised in these letters, all of which have been considered and many of which have been incorporated in the Partial Report/Award issued concurrently with these Reasons, a question was raised as to my jurisdiction to make the following order, even on consent:

> 4. I FIND AND DECLARE that the amounts owed by the parties listed in Column 7 of Schedule A to the Private Mortgagees, Puccini Mortgage Corp., 53 Puccini Mortgage Corp., 388242 Ontario Limited, DaPaul Management Limited, Nastell Investments Limited and Castle Lane Design Group Inc. is $11,960,703.22.
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> . . .
>
> 6. I ORDER that the following payments be made forthwith by the Monitor in the following order:
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> . . .
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> c. Third, the Monitor shall pay to "Jack Greenberg, in Trust for Private Mortgagees", the balance of the funds held with respect to the subject lands and premises, up to but not exceeding the sum of $11,960,703.22.
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> d. Fourth, the surplus remaining after payments as above, if any, shall be retained by the Monitor subject to further disposition by the Court.

[10] This jurisdictional question was raised again on 29 July 2016. Responding submissions on this jurisdictional were delivered on 21, 25 July 2016 and 2 August 2016. I have carefully considered all points raised.

Analysis and ruling on jurisdiction issue

[11] My jurisdiction derives solely from the consent Judgment of Reference of The Honourable Justice F. Newbould made 8 January 2015. In my capacity as Referee I have the jurisdiction conferred upon me by s. 58 (4) and (4.1) of the *Construction Lien Act*. I must therefore try and completely dispose of the action and all matters and questions arising in connection with the action, including the giving of leave to amend any pleading and the giving of directions to a receiver or trustee appointed by the court.

[12] I am also subject to the mandatory provisions of Section 51 of the *Construction Lien Act* (all emphasis added):

> 51. The court, whether the action is being tried by a judge or on a reference by a master, a case management master or <u>a person agreed on by the parties</u>,
>
> a. <u>shall try</u> the action, including any set-off, crossclaim, counterclaim and, subject to section 56, third party claim, and <u>all questions that arise therein or that are necessary to be tried in order to dispose completely of the action and to adjust the rights and liabilities of the persons appearing before it</u> or upon whom notice of trial has been served; and,
>
> b. <u>shall</u> take all accounts, make all inquiries, give all directions and do all things necessary to <u>dispose finally of the action and all matters, questions, and accounts arising therein or at the trial and to adjust the rights and liabilities of, and give all necessary relief to, all parties to the action</u>.

[13] Therefore, while I have no more jurisdiction than this I must at least exercise all this jurisdiction.

[14] Section 51 brings the issue down to this: is the issue of the amount owed to the individual Private Mortgagees (a) a question that arises from the pleadings <u>or</u> a question necessary to be tried to completely dispose of the action and to adjust the rights and liabilities of the persons appearing before it; <u>or</u>, (b) is it a matter, question, account arising in the Reference requiring "necessary" relief to the parties.

[15] In my view it is both. The Lien Claimants' pleadings claim priority over the Private Mortgagees. Resolving these claims for priority necessarily entails determination of the amount owed to the Private Mortgagees. Had the matter proceeded through the

hearing, instead of being resolved on consent, I would have had to make a finding as to the amount still owed to each Private Mortgagee to completely dispose of the issues framed by the pleadings.

[16] The amount still owed to the individual Private Mortgagees is also a matter, question, account "arising in the Reference", requiring necessary relief to the parties. In July 2015, a year before the hearing commenced all participating parties agreed on a List of Issues to be determined on this Reference, which I reproduce in full below (with emphasis added):

1. Whether the liens registered as general liens are valid, general liens, or not?
2. Do the contracts of the Lien Claimants include a valid lot-by-lot paragraph, or not?
3. Who are the builders/developers/owners that are liable to pay the provable liens and Statutory Holdback amounts?
4. What are the proven quantum of the lien claims and whether same need to be broken down based upon:
   (i) the individual lots;
   (ii) the separate owners/builders/developers; and
   (iii) the separate contracts entered into by the Lien Claimants with the various owners/builders/developers of the various parcels of land.
5. The timeliness of the liens considering the various contracts, the various lots and/or portions of land upon which the liens are registered, subject to issues 1 2, 3 and 4 above.
6. The quantum of the unsecured claims.
7. <u>How much is due and owing by the mortgagors to the private mortgagees on the individual mortgages</u>?
8. <u>Of the proceeds and payments received by the private mortgagees, how were those funds applied to repay the various private mortgages</u>?
9. <u>Are any of the mortgages building mortgages, and if so, what priority do some or all the lien claimants or the unsecured claimants have as against one or all of the mortgagees</u>?
10. If the liability of one or all of the mortgagees is restricted to a deficiency in the holdback, then what is or are the amounts of holdback in issue?
11. If one or more of the mortgagees failed to withhold portions of the mortgage advances to deal with their holdback exposure, what impact does such failure have on the priority issues involving subsequent mortgages?

[17] Items 7, 8 & 9 on the parties' agreed List of Issues are conclusive in favour of my jurisdiction over the issue of the amount owing to the Private Mortgagees on the individual mortgages, even if the pleadings left room for doubt, which in my view they do not.

[18] I therefore find that I have jurisdiction to make the consent Award/Report at paragraphs 4 and 6 (c) and (d).

Argo and Newmar claims for interest and costs

[19] On 15 July 2016 I was advised by lawyers for Argo Lumber Inc. and Newmar Window Manufacturing Inc. that those parties sought personal judgment for "principal" (by which I believe they meant interest) and costs, relying upon the original affidavits sworn in support of their respective lien claims. On Tuesday 19 July 2016, claims were advanced as follows:

Claimant	Costs claimed (incl. HST)	Interest claimed (incl. HST)	Total interest + costs claimed	Consent lien amount
Argo	$131,381.51	$85,785.64	$217,167.15	$135,060.11
Newmar	$78,546.36	$43,059.30	$121,605.66	$67,793.32
Total	$209,927.87			$202,853.43

[20] A hearing on these matters was held on 25 July 2016. Argo and Newmar relied upon the original Affidavits of Lou D'Ambrosio and Andreas Havenga sworn 24 March 2015 filed with their Books of Evidence in June 2015, as well as Supplementary Affidavits from each sworn on 15 July 2016.

[21] The D'Ambrosio and Havenga supplementary affidavits claim 24% interest on the basis of invoicing, and repeat statements made to them by their lawyers to the effect that the issue of personal judgment for costs is a live issue on this Reference, notwithstanding the resolution of lien issues on consent.

[22] The Lawyers for Silver Streams Inc., et al. filed a responding Brief of Documents on 22 July 2016, including authorities.

[23] The argument of Argo and Newmar is essentially as follows:

a. The invoices referencing 24% interest is *prima facie* evidence of entitlement and quantum, shifting the onus to the responding parties to prove that interest at this rate was *not* part of the agreement. As it was put in reply submissions, "this evidence [of the invoiced rate] is unchallenged". An adverse inference was requested based on the respondents failure to lead evidence to prove a negative, i.e. that there was no such agreement. It was argued that "implied agreement" cases are not applicable because in our case the invoices actually stipulate for interest at 24% and there is no need to imply an agreement.

b. A personal judgment for costs against the Silver Stream defendants was claimed in the aggregate amount of $209,927.87 on an agreed aggregate lien value of $202,853.43. It was argued that full indemnity costs should follow the event (except for $20,458.98 which is claimed in another proceeding before Justice Wilton-Siegel). It was argued that costs of this magnitude were proportionate to the Monitor's own costs of approximately $360,000. As to scale, counsel pointed out the risk of non-recovery and argued that the real question should be "why not full indemnity?" Two computer printouts of docket time for Argo and Newmar were filed at the hearing, unsupported by affidavit, but without objection. These docket entries commence on 15 and 18 October 2013, respectively.

[24] Silver Streams, supported by the Private Mortgagees, argued as follows:

a. Mr. D'Ambrosio verified the Newmar contract when cross-examined on his original affidavit and the Newmar contract, as verified, does not contain a provision for interest, let alone compounded interest at 24%. When cross-examined on his original affidavit, Andreas Havenga verified the Argo contract, and the Argo contract, as verified, does not contain a provision for interest, let alone compounded interest at 24%. The fact that these contracts do not provide for interest, distinguishes this case from the cases cited by Argo and Newmar. The factors identified by Justice Campbell in *Royal Group v. Core Precision* are applicable in this case: no interest rate in the contract; no discussion of interest rates between the parties; no historical acceptance of interest rate; no discussion of interest as part of disputed account, in demand letters for example; and no admission in the pleadings. The Newmar invoices actually do not mention interest at all, let alone mentioning interest at 24%; the mention of interest by Newmar occurs only in delivery information; and finally, there is no annualization of the compounded interest claimed to 26.82% as required by the federal *Interest Act* meaning that pre-judgment interest, if any, would be simple *Courts of Justice Act* interest at 1.3% p/a.

b. As to costs, it was argued that while I have jurisdiction to grant personal judgment for costs, no Bills of Costs were before me, notwithstanding requests for same. It was noted that the lien consent signed by Argo and Newmar provided clearly that there will be no costs. The Private Mortgagees and Bank of Montreal, were the only parties that took an adverse position to Argo and Newmar. Silver Stream took no adverse position. Thus, the cost of preservation and perfection and prosecution of the liens, which is substantially all Argo and

Newmar should have in costs relevant to this reference, are included in the existing consent order. As to the dockets sheets filed, counsel noted that costs recoverable on this Reference can date only from the inception of the Reference, i.e. from the order of Justice Newbould on 8 January 2015, not earlier. As to proportionality it was pointed out that the bulk of the Monitor's costs related to the CCAA proceedings and not to the referred lien proceedings, and therefore this is not a relevant metric for proportionality.

Analysis and ruling on Argo and Newmar claims for interest and costs

[25] As to interest, none of the factors identified by Justice Campbell in his endorsement in *Royal Group v. Core Precision* were established by Argo and Newmar. The admitted contract does not stipulate for interest. There is no evidence of discussion of interest rates between the parties. There is no evidence of historical acceptance of such an interest rate (or any interest rate).

[26] There is no evidence of haggling over interest in disputing the account. There is no basis for an award of prejudgment interest other than as contemplated by the *Courts of Justice Act* at the rate of 1.3% to the date of this Partial Report/Award, and I have so ordered.

[27] As to costs, all costs relevant to the lien itself (preservation, perfection, lienability, timeliness, and quantum) were included in the consent order signed on behalf of Argo and Newmar and filed. I have been given nothing else to establish to my satisfaction that any costs resulted from any adversarial position taken by the Silver Stream defendants.

[28] I therefore decline to grant Argo or Newmar further personal judgment for costs.

Personal judgments

[29] The consents that were filed disposed the lien issues, deficiency in holdback issues, priority issues and costs as a component of the liened amount.

[30] This left only the issue of personal judgments, as claimed in the various liens and lien actions, and as claimed by the non-lien claimant, Argyle Hardwood and Flooring Ltd., in its motion for summary judgment filed on 11 July 2016. Mr. Klein provided me with a summary of this information for his clients in chart form at the opening of the hearing under the heading "Claims Particulars". This was received without objection. I have in evidence copies of the relevant liens and/or statements of claim for the balance of the

lien claimants. On 4 August 2016 I sought clarification from all counsel attending the hearing regarding the issue of personal judgment.

[31] On 5 August 2016 I was referred to an email I received from counsel for the Private Mortgagees dated 25 July 2016 taking the following position:

> "With respect to the personal judgment amounts and PJI in accordance with the CJA as against Silver Streams, I take no issue. When the Private Mortgagees resolved the priority dispute, it was without prejudice to the right of the Medi Group Lien Claimants to request personal Judgment. I have copied Mr. Schwartz, the lawyer for Silver Streams so that he is aware of the request."

[32] I was also provided with a copy of the portions of transcript of the examination for discovery of Imran Jinnah on behalf of the Silver Stream defendants taken on 31 August 2015 containing the following statement by counsel for the Silver Streams defendants:

> MR. SCHWARTZ: No, no, no. Sorry, we've said consistently that we do not dispute --- the construction contracts we don't dispute, that they were entered into, right?
>
> We don't dispute that the work was done by the trades, right?
>
> We don't dispute that they're owed the monies that they claim they're owed.

[33] No contrary position to this statement was taken at the hearing and no contradictory evidence was tendered or received. I have therefore granted personal judgment as sought by each lien claimant using Mr. Klein's "Claims Particulars" chart for his clients and pleadings for the others, with interest at 1.3% from the date of claim to 11 August 2016.

[34] There was no opposition to the motion for summary judgment on the Argyle Hardwood and Flooring claim and I allow that claim, in the amount of $129,516.11 with interest at 1.3% in the amount of $4,226.95 for a total of $133,743.06.

Referee's costs

[35] Written submissions were received on behalf of the Private Mortgagees on 26 July 2016 on two further potential issues: a) the possibility that my costs as Referee might exceed the $100,000 provided for by paragraph 4 of the judgement of reference; and, b) the disbursement to the facility that hosted our reference proceeding. The Medi Group of lien claimants responded promptly on 27 July 2016.

[36] As it turns out, however, due to the abbreviation of the reserved hearing time, and because I have reduced my fees and disbursements as Referee including absorbing the $451.44 facility fee on 25 July 2016, the day that the Argo and Newmar interest and costs arguments were heard, my fees and disbursements in total do not to exceed $100,000, this issue does not arise.

[37] All facility costs prior to the 25 July 2016 hearing of the Argo and Newmar interest and cost hearing were to be borne, I understand, in some consensual fashion by the lien claimants and Private Mortgagees.

[38] Any Referee or facility costs associated with resolution of the Bank of Montreal's claim for costs will be dealt with in the Final Report/Award.

[39] The Partial Report/Award issued concurrently with these reasons reflects the above findings and rulings.

Duncan W. Glaholt, Referee
11 August 2016