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Clarkson Co. Ltd. et al. v. Ace Lumber Ltd. et al., [1963] S.C.R. 110

B. B. C. T.

(ii) MECHANICS LIENS

Clarkson Co. Ltd. et al. v. Ace Lumber Ltd. et al., [1963] S.C.R. 110.

The Supreme Court of Canada has recently decided in the case of *Clarkson Company Limited et al. v. Ace Lumber Limited et al.*[1] that the rental of construction equipment to a subcontractor for use on a specific building project does not entitle the supplier of that equipment to a lien within s. 5 of the Ontario Mechanics' Lien Act.[2] It was held that such a contribution to the building project did not amount to the performance of a service or the furnishing of materials to be used in the construction within the meaning of that section.

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[1] [1963] S.C.R. 110.
[2] R.S.O. 1960, c. 233.

The subcontractor, to whom the equipment had been rented, became bankrupt. Consequently, liens were claimed by two companies for the rental price of the equipment, which had been used in the erection of form work for concrete floors and columns in a building constructed on land owned by one of the appellants. The other appellant, the Clarkson Company, was joined as a defendant in its capacity as trustee in bankruptcy or the subcontractor. The equipment renters never parted with title to the equipment during these transactions and did not supply any personnel to assist with its installation or use.

On these facts, the Supreme Court of Canada, in a unanimous judgment delivered by Ritchie J., held that the plaintiffs had not furnished "any materials to be used in the making, constructing, erecting . . . of any erection, building . . ."[3] within the meaning of the Act. To this extent, the decision accords with all the opinions in the Court of Appeal for Ontario.[4] Both Courts agreed that unless the equipment was actually incorporated into the building or consumed in the construction process, it could not be described as "used" within the meaning of the section.[5] The possibility of partial consumption or depreciation of the equipment was not raised but it is submitted that the language of their Lordships indicates that nothing short of complete consumption or incorporation would persuade them to support such a lien claim. The Courts' conclusion seems well supported by the authorities cited[6] and is, indeed, further supported by the American cases[7] listed in the footnote to a quotation from Corpus Juris which Ritchie J. used later in the judgment for another purpose.

The Supreme Court then went on to hold, reversing the majority decision of the Court of Appeal, that the facts did not justify a lien for the performance of a service. Roach J.A. had reasoned below that, since the word "service" had been added to the Act some twenty years after it was first passed, it must be treated as having a different meaning from the word "work" which had been included in the Act from its inception. While this reasoning appeals to logic, it might be noted that what scant reports exist of the legislative debates at the time of that amendment do not pause to comment or to attach any significance to the addition of the word "service". If the reports show anything, it is that the concern of the legislature at that time was focused on the plight of the average labourer.[8] It would, therefore, seem unjustified to allow language adopted in such an atmosphere and unaltered since to redound to the advantage of claimants of the

[3] *Ibid.*, s. 5(1).
[4] [1962] O.R. 748.
[5] Per Ritchie J.: [1963] S.C.R. 110, 112; per Roach J.A.: [1962] O.R. 748, 751.
[6] Macauley & Bruce on *Canadian Mechanics' Liens*, 1951, p. 43 and *Re Northlands Grading & Earth Moving Co.*, [1960] O.R. 455.
[7] *Gilbert Hunt Co. v. Parry* (1910), 59 Wash. 646, 649 and *Webb v. Freng* (1923), 181 Wis. 39, 45.
[8] Toronto Mail and Empire, March 24 and April 7, 1896.

nature of the present corrporate plaintiffs. Nevertheless, this is the result of the reasoning of the majority in the Court of Appeal. Roach J.A. proceeded to adopt "a meaning consistent with the spirit of the Act",[9] as he saw it. He noted that older methods for supporting concrete until it hardened had been held to give rise to liens and concluded that that right ought not to be lost simply because technical improvements had made such equipment reusable. The Interpretation Act, s. 4, which states that "the law shall be considered as always speaking,"[10] was cited in support of this contention. Ritchie J., in the Supreme Court, endeavoured to answer this proposition by pointing out that the Act had been revised as recently as 1960 and that therefore this was not an occasion for adapting the language of an old statute to fit modern conditions.[11] With respect, it must be pointed out that the revision upon which his Lordship relied was not in any sense a real review of the Act but only a simple consolidation of the former Act with its recent amendments, none of which had anything to do with s. 5. Indeed the section has only been modified in insignificant details since it was first enacted in 1896. Therefore, it is respectfully submitted that this particular aspect of the Supreme Court's criticism of the lower decision is not justified. The Court was being asked to interpret old language in the light of new circumstances. However, it was not that aspect against which the Supreme Court particularly addressed its remarks.

The Court of Appeal had approached the problem of interpretation from a liberal and expansive point of view with the expressed object of implementing what was conceived by the majority to be the spirit of the Act. Despite reference to the words of the Act as having a sufficiently plain meaning,[12] it is submitted that, in effect, the majority was employing the attitude sometimes described as the mischief rule, first enunciated by Lord Coke in *Heydon's Case*.[13] However, in ascertaining the mischief and the remedy supplied by the legislature, it is not open to a court to add to the legislation. The possibility of such activity was advocated by Denning L.J. in *Magor and St. Mellons Rural District Council v. Newport Corporation*[14] but his suggestion that a court could fill the gaps in legislation was emphatically rejected by Lord Simonds in the House of Lords in the following words:

> This proposition — cannot be supported. It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation.[15]

The language of Ritchie J. in the case at bar, while less colourful, was equally emphatic. He noted that since the legislature "made no

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9 [1962] O.R. 748, 753.
10 R.S.O. 1960, c. 191.
11 *Supra*, footnote 1, 114.
12 *Supra*, footnote 4, 753.
13 (1584) 3 Co. Rep. 7a, 7b.
14 [1950] 2 All E.R. 1226, 1236.
15 [1952] A.C. 189, 191.

express provision for the inclusion of the renters of such equipment amongst those persons entitled to a mechancis' lien, it does not now lie with the Courts to create such a lien by adapting the statutory language that was used so as to accomplish that purpose."[16]

Clearly the liberal approach to interpretation did not find favour in the Supreme Court. Rather the Court preferred to adopt the dissenting opinion of Kelly J.A. who held:

> [The Act] constitutes an abrogation of the common law to the extent that it creates, in the specified circumstances, a charge upon the owner's lands which would not exist but for the Act — accordingly, while the statute may merit a liberal interpretation with respect to the rights it confers upon those to whom it applies, it must be given a strict interpretation in determining whether any lien-claimant is a person to whom a lien is given by it.[17]

The Court thus relied upon the traditional presumption against depriving the appellants of their common law rights as grounds for rejecting the more expansive attitude of the majority below.

Secondly, the Supreme Court preferred a much more literal interpretation of the words in issue. Their Lordships concluded that even if the mere supplying of equipment constitutes a service, that does not override the necessity of showing that the supplier "performs" that service. In the words of Ritchie J.:

> the words 'furnishes' and 'performs' as they occur in s. 5 of the Act must be given separate meanings and that the latter word must be taken as connoting some active participation in the performance of the service on the part of the lien claimant.[18]

The third aspect of the judgment is the attempt, and it is respectfully submitted, the unsuccessful attempt to derive support for the conclusion from the judgment of the Supreme Court of Nova Scotia in the case of *Cromwell Bros. Ltd. v. Maritime Minerals Ltd. et al.*[19] In that case the Court adopted the language of Corpus Juris[20] that:

> unless expressly so provided by statute, no lien can be acquired for the value or use of tools, machinery or appliances furnished or loaned for the purpose of facilitating the work where they remain the property of the contractor and are not consumed in their use but remain capable of use in some other construction or improvement work.

Taken as it stands this statement leaves little hope for the respondents. However, an examination of the American cases on which the statement is based may lead to the conclusion that the statement ought not to have been applied in the present case. The case of *Caldwell v. Steinfeld* is illustrative of all those cited in Corpus Juris. It contains a statement generally similar to the one quoted above,[21] but

16 *Supra*, footnote 1, 116.
17 *Supra*, footnote 4, 758.
18 *Supra*, footnote 1, 115.
19 (1940) 15 M.P.R. 39.
20 Vol. 40 at p. 86.
21 (1923) 294 F. 270, 217.

the statute there being construed contains no reference to the performance of a service as the basis for a lien.[22] The same is true of all the other cases cited.[23] In each case the statute confers a lien only for the furnishing of materials or the performance of labour. Services are never mentioned. As was suggested earlier, the quotation supports the Court's conclusion that there can be no lien for the furnishing of materials in the case at bar, but it is respectfully submitted that there is no justification for its use in support of a finding that there can be no lien for the performance of a service.

The use of American material in Canadian courts is, of course, by no means new, although in some cases it may be given rather summary consideration. Indeed, the statement from Corpus Juris was passed over very quickly by Roach J.A. in the Court of Appeal. He did, however, remark in passing[24] on the necessity of considering the provisions of the relevant American statutes, an admonition which seems, unfortunately, to have been overlooked in the Supreme Court.

That American decisions can play a useful role in Canadian jurisprudence is not open to contest. The recent British Columbia case of *Sloan v. Union Oil* is illustrative of that utility. In it Wilson J. noted that not only had American courts anticipated English developments in the field in question but they had already applied the new reasoning in fact situations similar to the case before him. He then quoted five pages of American material which, it is submitted, amply justified his conclusion that:

> I find these authorities, foreign of course, but not foreign to the common law, most convincing.[25]

In that case the learned judge was importing comments based on common law. In transplanting decisions based on statutes extra precautions must be taken to insure that the statutes are comparable. The judgment of Ritchie J. does not contain any indication that these precautions were taken in the present case. It is, therefore, submitted with respect that the third part of his reasoning is untenable.

What remains to separate the conclusion of the Supreme Court from that of the majority in the Court of Appeal is a fairly bald antithesis between their approaches to statutory interpretation. On the one hand the Court of Appeal, despite some reference to the plain meaning of words, has sought a broad interpretation consistent with the alleged spirit of the Act, whereas the Supreme Court has enlisted a presumption in favour of the preservation of the appellants' common law rights unless specifically abridged by the Act and has taken a more literal approach to the words under consideration.

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[22] Para. 3653 of Civ. Code of Arizona, Revised Statutes of Arizona, 1913.
[23] Cf. *Gilbert Hunt Co. v. Parry* (1910), 59 Wash. 646, 649 interpreting s. 1129 of Rem. & Bal. Code and *Webb v. Freng* (1923), 181 Wis. 39, 45 Interpreting s. 3327(a) Statutes of Wisconsin.
[24] *Supra*, footnote 4, 755-6.
[25] (1955) 16 W.W.R. 225, 245.

Each of these attitudes has both merits and defects. In support of the so-called mischief rule apparently employed in the Court of Appeal Maxwell has written:

> to arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope and object of the whole Act.

To which he added the warning that:

> At the same time the language of the statute must not be strained to make it apply to a case which does not legitimately, on its terms, apply by invoking consideration of the supposed intention of the legislature.[26]

In short, the mischief rule does not confer a licence to legislate. It may well be argued that modern statutes, couched in general language and aimed at achieving socially desirable results ought not to be subjected to more rigid rules of interpretation which may only serve to thwart those results. Perhaps, indeed, judges ought to attempt to discover and implement the so-called spirit of such Acts. It is submitted that such a suggestion was not lost on the Supreme Court. The quotation from Kelly J.A. cited earlier and adopted by Ritchie J. does contain a liberal attitude toward the rights conferred by the Act. The Supreme Court only employed a strict interpretation in deciding on whom those rights were bestowed.

It should also be remembered that not only the application but the approach itself is open to some criticism. Much of its attraction is lost when it is recalled that the courts have consistently refused, at least since 1903,[27] to look to the best sources for discovering legislative intentions, namely the reports of debates and royal commissions. The judges are thus forced to rely on their own social consciousness and it may well be that their particular sympathies will be at variance with those of the legislature. This seems to have been the result in the Court of Appeal.

A survey of reported comments in the legislature, admittedly few in number because of the long reluctance of the Ontario Legislature to record its deliberations, indicates that the principle object of concern was the plight of ordinary labourers. It is true that, at the time the Mechanics' Lien Act was first passed in 1873, it was only because of pressure by the Leader of the Opposition, Mr. Cameron, that a clause, setting a minimum of fifty dollars on the amount of a lien claimable under the Act, was removed.[28] Considering the low wage rates of that time, such a clause would have effectively excluded most labourers from any benefit under the Act. But, as pointed out, that clause was eliminated and by 1896, when the Act was substantially amended, the legislation was clearly focused upon the working man. The Lieutenant-Governor's speech on prorogation commented on the new Act as follows:

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[26] Maxwell on Interpretation of Statutes, 11th ed., Pp. 18-19.
[27] *Gosselin v. R.* (1903), 33 S.C.R. 255.
[28] Reported in the Toronto Mail: Feb. 19, 1873, p. 4.

> The circumstances under which the working-men and mechanics of this Province, as elsewhere, provide for the maintenance and protection of their families are at best somewhat precarious. The means which you have adopted to secure to them their proper earnings will serve to improve their social condition and to promote the happiness and comfort of all who are dependent upon them for subsistence and support.[29]

It is submitted that the legislature's intentions have not changed significantly since 1896 and, notwithstanding the fact that contractors and subcontractors are also protected by the Act, there is nothing in either the language or spirit of the Act to justify the extension of that protection to mere renters of equipment.

The alternative approach to interpretation adopted by the Supreme Court is no less subject to difficulties. As is pointed out by Professor Willis,[30] the apparent advantage of certainty which a literal approach seems to yield is really illusory. Even if the members of a court do agree that certain words have a plain meaning, it is by no means certain that they will arrive at the same conclusion as to what that meaning is. The notorious case of *Ellerman Lines v. Murray*[31] is illustrative. There all the judges were satisfied that the meaning was plain but managed to produce three different versions of what that meaning was. The problem is also aptly demonstrated in the present case wherein both Courts went to some pains to insist that they were enforcing the plain meaning of the words.

Maxwell, commenting on the presumption against invasion of common law rights, has said:

> In construing the words of an Act of Parliament we are justified in assuming the legislature did not intend to go against the ordinary rules of law, unless the language they have used obliges the court to come to the conclusion that they did so intend.[32]

Such a view might be attacked as unduly conservative for this age. Willis regarded it as something of a relic lingering on only in text books.[33] But the present decision is evidence of its continuing vitality and it is submitted that its role ought to be one of increasing importance in this era of constantly encroaching legislation.

An analysis of these and other modes of statutory interpretation seems always to lead to the same conclusion. Regardless of their relative merits and defects, the courts remain unwilling to divest themselves of any of these tools entirely. They prefer to retain them all against an occasion when each may be of value in achieving what the judges consider to be a desired end. It is submitted that such a multiplicity of tools and the degree of uncertainty associated with them is preferable to stultifying rigidity. If the conclusions which the courts reach are unsatisfactory to those concerned, they can, if necessary, be altered by legislation.

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[29] Mail and Empire, April 7, 1896.
[30] Statute Interpretation in a Nutshell (1938) 16 Can. Bar Rev. 1, 7.
[31] [1931] A.C. 126.
[32] Maxwell on Interpretation of Statutes 11th ed., p. 79.
[33] *Supra,* footnote 30, 14.

The impact of the present decision on the construction industry remains to be considered. The Supreme Court has preferred a restrictive view of the Mechanics' Lien Act or, at least, has opposed its extension. It may well be argued that, to the extent which the Act protects substantial contractors and suppliers such as the present respondents, it merely does for them what they ought to be expected to do for themselves. It ought to be a primary concern of any businessman to assure himself of the strength of the credit of any party with whom he proposes to contract. It is submitted that there seems to be little justification for giving the members of a particular trade special protection in case their initial precautions prove inadequate. Therefore, to the extent that the decision of the Supreme Court arrested the further expansion of such special protection, it is to be applauded.

An interview with the manager of a firm in the equipment rental business amply justifies this conclusion. When told of the Court's decision, he commented that the result had not altered his view of his legal rights in any way. He never had considered a mechanics' lien to be a protection of which he could avail himself. Knowing that his claim for rent would be unsecured, he habitually took extra care in the selection of his "accounts" and where a venture appeared risky he insisted on payment of rent in advance.

It is just such reasonable business attitudes which the Act tends to make unnecessary for those who are protected by it. Admittedly labourers are entitled to special protection but there seems to be little justification for the continued pampering of large companies which ought to be perfectly capable of looking after themselves.

It is for the legislature to decide whether the conclusion of the Supreme Court is to be overcome by new legislation. Doubtless it will be ably assisted in its deliberations by the members of the trades affected. It is submitted that the result of the Supreme Court decision ought not to be changed. If anything, to the extent that the Mechanics' Lien Act operates as an insurance policy against the consequences of sloppy credit practices, consideration ought to be given to amending it. The benefits would probably outweigh the disadvantages if substantial contractors and suppliers were deprived of the special protection which they now enjoy. B.B.C.T.