

Olympic Towers Limited (*Applicant*)*Respondent*;

and

**Theodore Sherman and Harold Strom,
Trustees, and Robert Lalonde and Shervale
Developments Inc.** (*Respondents*) *Applicants*;

and

Donald MacLeod, Trustee *Respondent*.

1978: December 19; 1978: December 21.

Present: Pigeon, Dickson, Beetz, Estey and Pratte JJ.

ON AN APPLICATION TO QUASH

Appeal — Motion for leave to appeal — Motion to quash — Proceedings taken as delaying tactics — Proceedings taken against good faith — Supreme Court Act, R.S.C. 1970, c. S-19, s. 46.

Olympic had made application for leave to appeal from a decision of the Ontario Court of Appeal refusing leave to appeal to that Court from a decision of the Divisional Court, or, in the alternative, from the decision of the Divisional Court which quashed an appeal from, and dismissed an application for judicial review of an order of Flanigan Co. Ct. J. in Mechanics' Lien proceedings relating to the property of Olympic. The litigation originated with Mechanics' Lien actions in 1975. A trustee was appointed with power to sell the real estate pursuant to *The Mechanics' Lien Act* at about the same time as an *ex parte* injunction was issued in the Supreme Court of Ontario restraining the mortgagees from exercising their power of sale under the mortgage in proceedings previously instituted. In June of 1978 His Honour Judge Flanigan approved the sale of the property. The Local Judge some months later issued a vesting order in accordance with his earlier approval of the sale. There followed a number of proceedings culminating in the application for leave to appeal to this Court which was based in essence on the refusal of the Local Judge to grant a two week adjournment. The applicants brought a motion to quash the application for leave to appeal.

Held: The motion to quash should be allowed.

There was nothing on the record which revealed any error of law on the part of the Local Judge in denying the request for an adjournment nor which indicated any

step which might or should have been taken which would produce any proceeds for creditors other than the mortgagee. The claim of the mortgagee was increasing daily in the form of interest on the outstanding capital of \$7,000,000. In view of the lengthy reviews already made of the issues, and the lack of merit in the request for leave to appeal, s. 46 could properly be applied. The request for leave appears as a delaying tactic and the proceedings to have been taken against good faith. The question as to whether the Supreme Court of Canada has the power to grant leave to appeal from a decision of a provincial Court of Appeal order denying an application for leave to appeal from a lower tribunal should remain open. The decision herein should not be regarded as authority that the question has been resolved against the power to grant leave on such occasions in an appropriate case.

MOTION TO QUASH a motion for leave to appeal from a decision of the Court of Appeal for Ontario refusing leave to appeal or, in the alternative from the decision of the Divisional Court. Motion to quash allowed.

Morris Manning, for the respondents, applicants.

B. A. Crane, Q.C., for the applicant, respondent.

Eric Williams, for Donald MacLeod, trustee.

Morris Kirtzer, for the lienholder.

The judgment of the Court was delivered by

ESTEY J.—This is an application made presumably pursuant to s. 46 of the *Supreme Court Act* by the respondents, Theodore Sherman and Harold Strom, Trustees, and Robert Lalonde and Shervale Developments Inc. to quash an application made by notice of motion by the applicant, Olympic Towers Limited, for leave to appeal from:

(a) a decision of the Court of Appeal of Ontario of December 4, 1978 refusing leave to appeal to that Court from a decision of the Divisional Court of Ontario dated November 6, 1978; or, in the alternative,

(b) the decision of the Divisional Court dated November 6, 1978 which quashed an appeal from and dismissed an application for judicial

review of an order by His Honour Judge Flanigan dated September 20, 1978 in *Mechanics' Lien* proceedings relating to the property of the applicant.

Such an application as this raises many issues. The question immediately arose in argument as to whether this Court, under the statutes or on the authorities, has the power to grant leave to appeal from a decision of a provincial Court of Appeal order which denied an application for leave to appeal to that Court from a lower tribunal. It is not necessary in view of the disposition I propose for the present application to decide this question, but it is not desirable in my view to leave the impression in the course of this proceeding, even by inference, that such question has been resolved against the power to grant leave on such occasions in a proper case.

The second aspect argued effectively by counsel on both sides is whether this Court may find in s. 46 the authority to quash an application for leave where the Court is of the view that the application for leave is an abuse of process. This Court, as an appellate tribunal, has of course the right, and indeed in the interests of the litigants before it, the duty, to control its own process and to prevent the abuse of that process.

On December 11, 1978, the applicants on this motion (the respondents on the application for leave) made application to the Chief Justice of this Court, apparently under Rule 56(4), to expedite the hearing of the application for leave now scheduled for hearing on January 23, 1979. The application was refused and the application for leave therefore continues to be scheduled for hearing on January 23, 1979. That application was made to the Chief Justice on the ground that "it is of the greatest importance that this application be brought on at the earliest possible date". The issue raised by the present motion to the Court to quash did not therefore come before the Chief Justice on the application to accelerate.

The litigation between the contending parties finds its origin in 1975 with actions under *The Mechanics' Lien Act* of Ontario which were eventually consolidated, and carriage of the actions

given to one lienholder. Thereafter, the respondent MacLeod was appointed Trustee with power to sell the real estate in question pursuant to *The Mechanics' Lien Act*, which order was made by the Local Judge sitting in Ottawa in February 1978. At about the same time, an *ex parte* injunction was issued in the Supreme Court of Ontario restraining the mortgagees from exercising their power of sale under the mortgage in proceedings previously instituted.

In June of 1978, His Honour Judge Flanigan, sitting as Local Judge of the Supreme Court of Ontario at Ottawa, approved the sale of the real estate in question under a contract of sale entered into by the Trustee as a result of advertisements published in the course of the aforementioned sale proceedings under *The Mechanics' Lien Act*. In the course of the hearing resulting in Judge Flanigan's order, an informal, oral offer was made by a person in attendance at the hearing to purchase these lands and premises for an unspecified price but no formal offer was made. A formal order was thereupon taken out approving the sale, directing the payment of proceeds into Court, and directing that the net proceeds be paid out to the respondent Trustees for the mortgagees.

It is significant to note that the purchase price in the contract of sale is for \$5,350,000 whereas the balance owing under the mortgage is in excess of \$7,000,000. We have not the mortgage before us but assuming an interest rate of 10 per cent, the interest accumulation amounts to some \$14,000 per week. There followed a flood of proceedings, including the following:

- (a) A motion to cite His Honour Judge Flanigan, the respondent Trustees and their counsel for contempt of the injunction issued by the Supreme Court.
- (b) An order in the Supreme Court dissolving the aforementioned injunction restraining the exercise of the power of sale under the mortgage.
- (c) An application for judicial review to the Ontario Divisional Court of the order of the Local Judge approving the sale. This was dis-

missed by the Divisional Court in lengthy reasons.

(d) An appeal was taken from the said order of the Local Judge to the Divisional Court and the appeal was quashed.

(e) An application for leave to appeal was made from both orders of the Divisional Court to the Ontario Court of Appeal and was dismissed by the Court of Appeal on September 6, 1978.

(f) An order was issued by the Local Judge vesting title to the property in the purchasers under the aforementioned contract upon payment of the purchase price subject to adjustments.

(g) An appeal from and notice of motion for judicial review of the said order of the Local Judge was made to the Divisional Court and both the appeal and the application for judicial review were quashed.

It was from these orders of the Divisional Court that an appeal was taken to the Court of Appeal of Ontario which was dismissed without reasons, written or recorded, and apparently without calling upon the respondents. To complete the chronological record of this litigation, a notice of motion was thereupon filed in this Court seeking leave to appeal from the orders of the Court of Appeal and the Divisional Court as mentioned at the outset, returnable on January 23, 1979, and in response thereto a notice of motion was filed by the respondent Trustees for an order directing the hearing of the application for leave to appeal on December 18, 1978. Finally, we come to the notice of motion with which we are now dealing wherein the applicants (the respondents Sherman and Strom, Trustees, and Robert Lalonde and Shervale Developments Inc.) seek an order quashing the notice of motion for leave to appeal.

In the course of the hearing in September 1978 of the application for an order vesting title in the purchaser, another oral offer, or a repetition of the oral offer made during the hearing in June, was advanced by a person in attendance in the court room and a request was made by Olympic Towers Limited or some of its shareholders or both, and perhaps by some lienholders as well, for a two week adjournment. His Honour Judge Flanigan

considered this request and rejected it giving oral reasons. In essence, the application for leave to appeal to this Court is based upon the refusal of the Local Judge to grant such adjournment. The record does not reveal that the general proposal to purchase then being advanced would be for a price which would exceed the outstanding indebtedness under the mortgage. There is nothing in the rather voluminous record to indicate why any such offer, if of substance, would not have been forthcoming in response to the advertisements in the sale proceedings under *The Mechanics' Lien Act*.

Indeed there is nothing whatever on the record which reveals any error of law on the part of the learned Local Judge in denying the request for adjournment or in making the order of September 20, 1978.

I note that the lien actions have been consolidated and the party given the carriage of the lien actions pursuant to the provisions in *The Mechanics' Lien Act* has not come forward in this Court in support of the respondents to the motion to quash.

Section 46 of *The Supreme Court of Canada Act* provides:

The Court may quash proceedings in cases brought before it in which an appeal does not lie, or whenever such proceedings are taken against good faith. R.S., c. 259, s. 45.

The motion to quash is brought on the ground that the notice of motion for leave to appeal filed by Olympic Towers Limited is "a proceeding . . . taken against good faith". Nothing in the record indicates any error of law on the part of the Local Judge in declining to grant an adjournment on the 20th of September and in issuing the order he did on that date. Nothing indeed appears on the record to indicate any step which might or should have been taken which would produce any proceeds which would be available to creditors other than the mortgagee. The claim of the mortgagee in these proceedings is increasing daily in the form of interest on the outstanding capital in excess of \$7,000,000. Nothing has been advanced by the applicant, Olympic Towers Limited, to demonstrate any possible basis for a reasonable anticipa-

tion of success in any form on the application for leave to appeal. It is not irrelevant to note that *The Mechanics' Lien Act* was long ago adopted for the purpose of providing a summary method of determining and satisfying valid claims against real estate usually arising in the course of construction and reconstruction of buildings. This lien proceeding has been through the Divisional Court and the Court of Appeal of Ontario twice. Lengthy reviews have been made of the issues which have arisen. The request for leave to appeal to this Court is utterly devoid of merit and is demonstrably a resort to one more weapon in the arsenal of delay. This is, in my view, a proper case for the application of s. 46, these proceedings having been taken against good faith. In my view, the record brings this proceeding squarely within the concluding clause of s. 46 and I therefore would allow the motion to quash the application made by notice of motion for leave to appeal dated December 5, 1978 with costs to the respondents, Sherman and Strom, Trustees, and Lalonde and Shervale Developments Inc., as well as the respondent Donald MacLeod, Trustee.

Motion to quash allowed.

Solicitors for Olympic Towers Limited: Outerbridge, Thomas & Mueller, Toronto.

Solicitors for Theodore Sherman and Harold Strom, Trustees: Minden, Gross, Grafstein & Grafstein, Toronto.

Solicitors for Robert A. Lalonde: Cameron, Brewing & Scott, Toronto.

Solicitors for Shervale Developments Inc.: Tomosk, Mayhew & Karr, Ottawa.

Solicitors for Donald A. MacLeod, Trustee: Charleson, Clarke, McEney & McEney, Ottawa.