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*Feb. 3, 4, 7
*Jun. 28

MINNEAPOLIS - HONEYWELL REGULATOR COMPANY LIMITED (*Plaintiff*) ..... APPELLANT;

AND

EMPIRE BRASS MANUFACTURING COMPANY LIMITED (*Defendant*) .. RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Mechanic's lien—Action by sub-contractor to enforce trust under s. 19 of the Mechanic's Lien Act, R.S.B.C. 1948, c. 205—Meaning and applicability of s. 19—Assignment of book debts by contractor to creditor—Whether moneys received by contractor subject to trust—Principle of distribution—Jurisdiction.

The appellant claimed an accounting of moneys claimed to be held in trust by the respondent under s. 19 of the *Mechanic's Lien Act*, R.S.B.C. 1948, c. 205, and for judgment for any amount due.

A sub-contractor, which had a contract from the general contractor to install heating plants in four schools being built by the general contractor, had engaged the appellant to supply and install the automatic heating controls. The respondent was the principal supplier of materials engaged by the sub-contractor for this contract and earlier contracts.

Before the completion of its contract for the schools, the sub-contractor, which was then indebted to the respondent in the sum of $19,278.41, assigned to the respondent its present and future book accounts as security for that debt. The general contractor was notified of the assignment and thereafter made payments by cheques payable jointly to the sub-contractor and the respondent. Both then would decide what accounts of the sub-contractor should be paid, and the remaining moneys were applied on account of the indebtedness of the sub-contractor to the respondent.

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*PRESENT: Rand, Kellock, Estey, Locke and Fauteux JJ.

The appellant, which had lost its right to a mechanic's lien against the schools by not filing within the prescribed time, obtained judgment against the sub-contractor for the balance of moneys owed it. Subsequently the sub-contractor went into liquidation.

The trial judge found that the sub-contractor was a sub-contractor within the meaning of s. 19, that the assignment secured only the specific debt, that the debt had been extinguished and that subsequent moneys subject to the trust of s. 19 had been received by the respondent. The Court of Appeal, by a majority, reversed this judgment.

Held: The appeal should be allowed and the judgment at trial restored but modified.

Per Rand, Kellock, Estey and Fauteux JJ.: The appellant was cestuis que trust of the moneys received by the sub-contractor. The word "received" in s. 19 includes money paid to an assignee. Otherwise the entire purpose of s. 19 could be nullified by an assignment contemporaneous with the contract. But these payments, whether direct or to an assignee, remain subject both to s. 16 as respects liens and to s. 19 as to the beneficiaries of the trust. No assignment can destroy the rights created by s. 19 in the moneys paid. However, the moneys are not required to be distributed on a pro rata basis. The sub-contractor has a discretionary power and his obligation is satisfied when the moneys are paid to persons entitled to the trust, whatever the division.

In the present case, the respondent was properly liable as for a breach of trust to the extent of trust moneys received beyond the debts arising out of the contracts considered severally and applied to other debts. To the amount of that excess it is liable to the appellant for any balance that may be owing it on the same contract; and the right to have this determined and to recover judgment for any amount so found to be due can be enforced in any appropriate court of the province.

Per Locke J.: Once the specific debt for which the assignment was given was extinguished, the sub-contractor was entitled to all further moneys payable in respect of its sub-contract. The assignment secured only that debt and not any further liability incurred thereafter by the sub-contractor to the respondent. The moneys received during the life of the assignment were not received by the sub-contractor but were the property of the respondent and therefore not subject to the trust.

There is no ambiguity in s. 19, and while it creates difficulties to contractors seeking credit and there is no direction as to the apportionment of the fund, this is not sufficient to say that the rights can only be exercised by those who have a right of lien upon the work; the section was apparently designed to provide further security. S. 16 does not apply to the rights given to a creditor by s. 19.

Claims under s. 19 are for the recovery of moneys declared to be trust funds and are recoverable by action in the Supreme Court of British Columbia.

The Laws Declaratory Act, R.S.B.C. 1948, c. 179 and *Castelein* v. *Boux* (1934) 42 Man. R. 97 referred to.

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APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing, Robertson J.A. dissenting the judgment at trial directing enforcement of a trust under s. 19 of the *Mechanic's Lien Act*, R.S.B.C. 1948, c. 205.

D. M. M. Goldie for the appellant.

V. R. Hill for the respondent.

The judgment of Rand, Kellock, Estey and Fauteux JJ. was delivered by:—

RAND J.:—This appeal raises the question of the interpretation of s. 19 of the *Mechanics' Lien Act* of British Columbia. The section reads as follows:—

> All sums received by a contractor or a sub-contractor on account of the contract price shall be and constitute a trust fund in the hands of the contractor or of the sub-contractor, as the case may be, for the benefit of the owner, contractor, sub-contractors, Workmen's Compensation Board, labourers, and persons who have supplied material on account of the contract; and the contractor or the sub-contractor, as the case may be, shall be the trustee of all such sums so received by him, and, until all labourers and all persons who have supplied material on the contract and all sub-contractors are paid for work done or material supplied on the contract and the Workmen's Compensation Board is paid any assessment with respect thereto, shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust.

I am unable to feel difficulty about what this language provides. The Act is designed to give security to persons doing work or furnishing materials in making an improvement on land. Speaking generally, the earlier sections give to such persons a lien on the land, but that is limited to the amount of money owing by the owner to the contractor under the contract when notice of the lien is given to him: only thereafter does he pay the contractor at any risk.

For obvious reasons this is but a partial security; too often the contract price has been paid in full and the security of the land is gone. It is to meet that situation that s. 19 has been added. The contractor and sub-contractor are made trustees of the contract moneys and the trust continues while employees, material men or others remain unpaid.

The appellants were, therefore, cestuis que trust of the moneys received by the sub-contractor. The mode of payment followed by the contractor toward the sub-contractor,

(1) [1954] 4 D.L.R. 800; 13 W.W.R. (N.S.) 449.

Irvine & Reeves Limited, and the respondent is given in the reasons of my brother Locke and I will not repeat it; but apart from the special features, I cannot interpret the word "received" in s. 19 as not including money paid to an assignee. The money "received" on account of the contract is the same as that paid by the contractor: payment the correlative of receipt. The assignee acts through the right and power of the assignor; and the receipt by him is likewise that by the creditor. If this were not so, the entire purpose of the section could be nullified by an assignment contemporaneous with the contract. S. 16 declares that

> no assignment by the contractor or any sub-contractor of any moneys due in respect of the contract shall be valid as against any lien given by this Act . . .

But this does not prevent valid payment to the assignee prior to a notice of lien. The statute contemplates payments to the contractor whether direct or to his assignee, but these remain subject both to s. 16 as respects liens and to s. 19 as to the beneficiaries of the trust. The assignee of such moneys must either see to the satisfaction of the rights under the trust, either directly or by way of subrogation to them, or run the peril of participating in a breach of it. I have no doubt that no assignment can destroy the rights created by s. 19 in the moneys so paid over.

S. 19 does not, however, require that they be distributed on a pro rata basis. The sub-contractor has, in this respect, a discretionary power, and his obligation is satisfied when the trust moneys are paid out to persons entitled, whatever the division. This, of course, might be affected by rights of unpaid trust creditors under other provisions of law.

These considerations raise another question which must be examined. Since it cannot be said that the appellants have any specific and exclusive interest in the fund, their right to recover against the respondent sounds in damages, and in some form or other it must appear that the improper diversion has affected moneys that would otherwise have reached the appellants. There is no claim on behalf of other creditors now entitled to the benefits of the trust; and the situation must be viewed from the standpoint of the sub-contractor as he would have carried out his duty. If there were no other claimants in the same class, that duty would be to pay the moneys still in the trust to the appellants.

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A judgment against the respondent in this case would be equivalent to an appropriation to the appellants by the sub-contractor. In the absence of circumstances which would reduce the claim first made to a proportionate sharing with other creditors of the same rank, it will be presumed that the diverted moneys would have gone to that claimant and their amount, up to that of his debt, will be the measure of damages.

But I am unable to agree that the arrangement between the respondent and the sub-contractor was such that as to trust moneys paid to persons other than the respondent, there could be said to have been a participation by the latter in their wrongful application. The most that can be said is that the respondent possessed a veto on payments to others than itself; a failure to exercise it cannot render the respondent a party to their diversion. There is nothing to show any interest of the respondent in them otherwise than as they may have affected the debt to itself.

The respondent, knowing all the facts, was therefore properly found liable as for a breach of the trust to the extent of trust moneys received beyond the debts arising out of the contracts considered severally and applied to other debts. To the amount of that excess it is liable to the appellants for any balance that may be owing them on the same contract; and the right to have this determined and to recover judgment for any amount so found to be due can be enforced in any appropriate court of the province.

I would, therefore, allow the appeal and restore the judgment at trial, modified by substituting the following in place of the directions there given for taking accounts and the order for judgment and costs:—

(*a*) A declaration that the respondent was a party to a breach of trust in relation to such part of the moneys represented by the joint cheques received, directly or indirectly, by the respondent in excess of and applied otherwise than on the accounts of the four contracts severally;

(*b*) An account to determine the amount of the trust funds received by the respondent and the appellants in respect of the contracts severally and their application;

(*c*) An account to determine the balance owing by the sub-contractor to the respondent and to the appellants on each of the contracts after the allocation thereto severally

of all applicable trust funds received by them, and the deduction therefrom of any sums other than such trust moneys appropriated by the respondent or the appellants thereto;

(*d*) Should it appear that the appellants have received trust moneys in excess of their claim on any contract and that in respect of the same contract there is a balance owing to the respondent, the amount of the excess to the extent of the balance so owing the respondent shall be deducted from moneys found to be owing by the respondent to the appellants on the remaining contracts;

(*e*) The appellants will be entitled to judgment against the respondent for the aggregate amount, if any, certified to be due them on the said contracts on the basis of the foregoing to the extent of the amount found to have been so received by the respondent and not so applied or allocated for trust purposes. The costs of the trial and of taking the accounts will be in the discretion of the Court on entering final judgment.

The appellants will have their costs in the Court of Appeal and in this Court.

LOCKE J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia (1), which allowed the appeal of the present respondent from a judgment of Davey J. (as he then was) in favour of the present appellant. Robertson J.A. dissented and would have dismissed the appeal.

The appellants supply and install automatic controls for heating systems. The defendant, Irvine and Reeves Ltd. (which is not a party to this appeal), was engaged in the business of a plumbing and heating contractor. The respondent is a wholesale dealer in plumbing and heating supplies.

Irvine and Reeves Ltd. (hereinafter referred to as the sub-contractor) had, prior to February 4, 1950, entered into contracts for the installation of heating plants in four public schools, with general contractors who had, in turn, contracted for their construction with the various public authorities for whom the same were built. The schools

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were the Carmi School at Penticton, B.C., the Helen Street and the Indian Schools at Port Alberni, B.C. and the J. P. Dallos School at Westview, B.C.

The respondent company was the principal source of supply of the material needed for the work by the sub-contractor and, on the date above mentioned, had supplied material for other contracts upon which the latter was engaged. It is not clear from the evidence whether at that date any materials had been supplied by the respondent in connection with the four schools above mentioned.

On February 4, 1950, the respondent obtained from the sub-contractor an assignment of book accounts which recited, inter alia, that the assignor was then indebted to the assignee in the sum of $19,278.41 for goods theretofore sold and delivered, that the assignors had applied for a continuing line of credit:—

> upon the execution of this indenture as collateral security for the said past and present advances (hereinafter called "the said indebtedness") in order to assist the assignors in its said business

and that in consideration of the said indebtedness the assignor assigned all debts, claims and demands then due, owing or accruing due to the assignor, and all such debts, claims or demands which might thereafter become due and owing to the assignor arising out of its said business. These recitals were followed by a clause which read in part:—

> It is understood and agreed that this indenture is given as collateral security only for the due payment of *the said indebtedness.*

Upon obtaining this assignment the respondent gave notice of it to the general contractors and thereafter payments by the general contractors, other than those for small amounts, were made by cheques made payable jointly to the respondent and the sub-contractor. These payments included the entire amounts payable to the sub-contractor on its contracts for the four schools mentioned, which included the automatic heat control system supplied and installed by the appellant at the request of the sub-contractor. By virtue of the manner in which these payments were made, the respondent obtained what amounted to complete control over the financial operations of the sub-contractor. When cheques payable to their joint order were received, it was necessary for the sub-contractor to obtain the consent of the respondent to the payment of any sums.

other than the small amounts referred to which do not enter into the matter, to its other creditors. From the payments, however, some amounts were, with the respondent's consent, paid on account of the amounts payable to the appellant. In March 1952 the sub-contractor went into liquidation, at which time there remained payable by it to the appellant in respect of the four schools a sum of $4,970.03. For this amount the appellant had recovered judgment against the sub-contractor on February 25, 1952.

The appellant's claim, the validity of which is to be determined in the present action, depends upon the construction which is to be placed upon s. 19 of the *Mechanics' Lien Act* (c. 205 R.S.B.C. 1948) and its application to the facts disclosed by the evidence. It reads as follows:—

> 19. All sums received by a contractor or a sub-contractor on account of the contract price shall be and constitute a trust fund in the hands of the contractor or of the sub-contractor, as the case may be, for the benefit of the owner, contractor, sub-contractors, Workmen's Compensation Board, labourers, and persons who have supplied material on account of the contract; and the contractor or the sub-contractor, as the case may be, shall be the trustee of all such sums so received by him, and, until all labourers and all persons who have supplied material on the contract and all sub-contractors are paid for work done or material supplied on the contract and the Workmen's Compensation Board is paid any assessment with respect thereto, shall not appropriate or convert any part thereof to his own use or to any use not authorized by the trust.

This enactment first appeared as an amendment to the *Mechanics' Lien Act* (c. 156, R.S.B.C. 1924) as s. 18A, being added by s. 2, c. 48 of the Statutes of 1948. The new section appeared in c. 156 and appears in c. 205 of the Revised Statutes of 1948 as the last of seven sections bearing a sub-heading "Security". It is to be noted that s. 16 of the Act provides that no assignment by the contractor or any sub-contractor of any moneys due in respect of the contract shall be valid as against any lien given by the Act.

Other than an unreported decision in *Weeks* v. *Mackenzie,* decided in 1953 by His Honour Judge Boyd of the County Court of Vancouver, the interpretation of the section has not apparently been considered by any court in British Columbia. A provision very similar in its terms, however, was added to the *Builders and Workmen Act of Manitoba* (c. 20, R.S.M. 1913) by c. 2 of the Statutes of Manitoba in 1932. That section was considered by the Court of Appeal

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in Manitoba in *Castelein* v. *Boux* (1). In that matter, a garnishing order was served upon an owner by a creditor of the contractor engaged in the construction of a work in an action against the latter. The debt sued for was not contracted in connection with the work. Part of the moneys payable to the contractor had been retained by the owner at the time the garnishing order was served and the defendant claimed that the amount due to him was affected by the trust declared by the section in favour of the workmen and persons who had supplied material on account of the contract. Prendergast, C.J.M., with whose Trueman and Richards JJ.A. agreed, decided the matter on the ground that, since the moneys had not reached the hands of the contractor, the section was inapplicable.

A similar section was added to the *Mechanics' Lien Act of Ontario* by s. 21 of c. 34 of the Statutes of 1942. We have not been referred to and I have been unable to find any case in that province in which the effect of the section, the meaning of which is indistinguishable from that of the British Columbia section, has been considered.

Davey J., in a carefully reasoned judgment in which the facts are reviewed in detail, found that Irvine and Reeves Ltd. were sub-contractors within the meaning of s. 19, that the assignment of book accounts of February 4, 1950, was to secure a specific indebtedness of $19,278.41 and not any further or other indebtedness, that this debt had been extinguished by payments received by the respondent, either from the sub-contractor directly or by payments by the principal contractors made to the joint order of the respondent and the sub-contractor, and that thereafter further moneys subject to the trust declared by s. 19 had been received by the respondent. A reference was directed to ascertain the amounts subject to such trust and the respective rights of the respondent and the sub-contractor in regard to them. The appellant had not filed liens against the various school properties, as might have been done for the protection of the lien rights given by s. 6 of the Act, but the learned trial judge was of the opinion that this did not affect the rights of the appellant under s. 19.

(1) (1934) 42 Man. R. 97.

While it was alleged in the Statement of Claim that the payments made by the general contractors pursuant to the terms of the assignment of book accounts amounted to a fraudulent preference, this claim was abandoned at the trial. Granted the validity of the assignment the respondent, by virtue of the provisions of s-s. 25 of s. 2 of *The Laws Declaratory Act* c. 179, R.S.B.C. (1948), was entitled to proceed directly against the general contractors as moneys became due to the sub-contractors, and this without reference to the latter and as between the respondent and the sub-contractor the former was entitled to these moneys to the extent of its secured debt. The situation was, however, changed when that debt was extinguished. The sub-contractor was then entitled to all further sums payable in respect of the sub-contracts, and it was upon this basis that the judgment at the trial granted relief to the appellant in respect of moneys received by the respondent after that time.

O'Halloran J.A., with whom Sidney Smith J.A. agreed, found that any rights which s. 19 purported to give could be invoked only by a person who was, at the time of the institution of the action, entitled to a lien upon the property in respect of which the work had been done or the materials supplied. The view of the learned trial judge to the contrary on this aspect of the matter was adopted by Robertson J.A.

I find no ambiguity in the language of s. 19 and, while the adding of this additional protection for the interests of labourers and material men may create difficulties for contractors seeking credit, as pointed out by Richards J.A. in *Castelein* v. *Boux* (at p. 106), and while the section lacks any direction as to the manner in which the trust fund declared is to be apportioned among those entitled, these considerations do not, in my opinion, afford any sufficient reason for failing to give effect to the plain meaning of the language employed or to read into the section a provision that the rights given may be exercised only by those who then have a right to a lien upon the work.

The Mechanics' Lien Act of British Columbia has since 1879 afforded to labourers, material men, contractors and others a means of enforcing their claims against the work produced as a result of their efforts, or with the materials

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they have supplied, by filing claims of lien within a defined period and, if default were made, instituting proceedings to realize the amounts payable. S. 19 was apparently designed to provide further security for such persons by providing that moneys received as payments on account of the principal contract or of any sub-contract should, in the hands of the recipients, constitute a trust fund for their benefit.

By s. 20 the lien given by s. 6 ceases to exist if, within the periods of time defined, the claimant fails to file an affidavit, stating the particulars of claim and the description of the property to be charged in the nearest county court registry in the county where the land is situate, and a duplicate, certified as such by the County Court Registrar, in the Land Registry Office in the district within which the lands are situate, and thereafter institutes proceedings for its enforcement. These provisions and the provisions for the enforcement of the lien upon the property contained in ss. 29 to 37, inclusive, have no application to the rights afforded to the material men, amongst others, by s. 19. Had it been the intention of the legislature that these rights should be extinguished in the same manner as the right of lien against the property, as provided by s. 20, I think an appropriate amendment to that section would have been made when s. 18A was added in 1942.

I am unable to agree with the contention of the respondent that the rights afforded to material men and others by s. 19 may only be asserted in proceedings in the County Court. Proceedings for the enforcement of the lien against the property in connection with which the material has been supplied or the work has been done are required to be taken in the County Court and, by reason of the provisions of s. 35, a judgment may be recovered in that court on a personal claim against the contractor or owner who may have ordered the work done or material supplied, notwithstanding that the amount may exceed the ordinary jurisdiction of the County Court. All of these provisions of the statute refer in terms to proceedings directed to realization of the claim out of the property and none refer to claims arising by virtue of the provisions of s. 19. Claims under that section are for the recovery of moneys declared to be trust funds to which the material men, amongst others, may

resort. The jurisdiction of the Supreme Court of British Columbia is declared by s. 9 of the Supreme Court Act (R.S.B.C. 1948, c. 73) as follows:—

> The Court is and shall continue to be a court of original jurisdiction and shall have complete cognizance of all pleas whatsoever and shall have jurisdiction in all cases, civil as well as criminal, arising in the province.

Here the claim advanced is to recover sums in excess of the ordinary jurisdiction of the County Court and is not of the nature referred to in s. 35. The jurisdiction of the Supreme Court is undoubted, in my opinion.

Sidney Smith J.A., who agreed generally with the reasons expressed by O'Halloran J.A., found that the appellant's claim also failed on the ground that the assignment of book debts secured not only the debt to which I have referred but any further liability incurred thereafter by the sub-contractor to the respondent. As to this, for the reasons I have already stated, I agree with the learned trial judge and with Robertson J.A. The claim of the respondent to moneys payable by the contractor to the sub-contractor depended entirely on the terms of the written assignment of February 4, 1950. The evidence of the witness Welsford referred to, by which it was sought to supplement the terms of the writing, was not admissible. The matter is simply a matter of the construction of the language of the written assignment but, if its terms were ambiguous (and I can see no ambiguity) and other evidence was admissible to construe its terms, it may be noted that ten days after it was given, at the instance of the respondent, the sub-contractor addressed a letter to the former, the opening sentence of which read:—

> By way of greater precaution in connection *with the present indebtedness of our company to yourself* which has already been the subject of a general assignment of book accounts.

This was written at the instance of the witness Welsford and indicates what both parties understood.

The judgment delivered at the trial restricted the relief granted to the moneys received by the respondent after the debt of $19,278.41 was extinguished. S. 19 declares that all sums received by the contractor or sub-contractor constitute a trust fund for the benefit of the designated persons, and as, by reason of the assignment, the moneys received by the respondent were, as between the respondent and Irvine and

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Reeves Ltd., the property of the former, it was found that none of these moneys were received by the latter and hence were not at any time subject to the trust. As to s. 16, Davie J. was of the opinion that it did not apply to the rights given to a creditor by s. 19. With these conclusions of the learned trial judge I respectfully agree.

I would allow this appeal, with costs here and in the Court of Appeal, and restore the judgment at the trial, subject, however, to the variation suggested in the concluding paragraph of the reasons for judgment of Mr. Justice Robertson as to the order as to costs, for the reasons there indicated, pending a report on the accounts and providing that further consideration of the action be reserved.

Appeal allowed with costs, judgment at trial restored but modified.

Solicitors for the appellant: *Jestley, Morrison, Eckardt & Goldie.*

Solicitors for the respondent: *Macrae, Montgomery & Macrae.*