

May 2005

CONSTRUCTION LAW BULLETIN

SCOPE OF BUILDER'S LIEN

The High Court has, in a judgment recently handed down¹, clarified the scope of a builder's lien and reiterated some of the relevant principles underpinning such a lien.

The facts were:

- Mr Ballinger owned a property in Knysna.
- Norvic Diverse Systems (Norvic) was employed by Ballinger to build a dwelling on the property.
- Ballinger paid a deposit of R418 000,00 to Norvic in advance of the commencement of construction.
- Norvic purchased approximately 17 000 bricks for the contract at a cost of R80 000,00, some of which were delivered to site.
- The site was handed over to Norvic.
- Before Norvic incurred any other expenditure, whether in the form of labour or materials supplied or otherwise, the building contract between the parties was terminated.
- Norvic contended that the termination arose as a result of a breach of contract on

the part of Ballinger. It claimed an amount of R350 000,00 by way of damages over and above the R418 000,00 already paid to it on the basis that Ballinger could have the bricks on site but the rest of the bricks and other materials purchased for the contract at Norvic's premises would be retained by it.

- Norvic retained possession of the site following termination of the contract and put in security guards to secure the property on its behalf.
- Norvic frustrated Ballinger's attempts to sell the property by warning off estate agents and prospective buyers with a letter saying that it was exercising a builder's lien and occupation of the property would not be handed over until its claim had been paid.

Ballinger, understandably aggrieved at this manhandling meted out to him by Norvic, applied to court to have Norvic evicted from the site on the grounds that it had no valid builder's lien.

After considering the facts and in particular:

- that no work had been done;
- the only item of expenditure was R80 000,00 in respect of bricks;
- only some bricks had been delivered to site; and
- the expenditure was more than covered by

¹ R D Ballinger and Another v Norvic Diverse Systems CC and Another, High Court of South Africa (SECLD), Case No 461/05, date of judgment 24 February 2005.

the deposit paid,

the court held that:

- a builder only has a lien over property where he has actually done work and he has no lien for work not yet done or expenses not yet incurred;² and
- in order for a lien to arise, payment for the work or material concerned must be due and not merely owing or accrued.³

In the result, the court issued an order directing that Norvic vacate the property, restore possession of it to Ballinger and that it pay the legal costs.

It is worth considering the second finding of the court relating to a lien not being enforceable unless the debt relied on is due, owing and payable.

In most standard form contracts, there will be an obligation on the contractor to hand over the site at practical completion or first delivery stage at a time when inevitably the contractor has not been finally paid for all the work done. The contractor cannot at this stage refuse to give delivery on the grounds that he has a lien because he will be due money in the future.

It is a different matter however if at the time there is an amount due, owing and payable to the contractor, for example, in terms of a previous payment certificate which has been issued and which is due for payment but has not yet been paid. In such circumstances, the contractor can of course enforce his lien and refuse to give possession of the site despite practical completion having been achieved.

The principle was usefully summed up with reference to outstanding retention moneys in the Gallic Construction case as follows:

“The builder’s lien is a debtor and creditor lien, which is a right of retention for a debt ex contractu (cf Brooklyn House Furnishers (Pty)

² United Building Society v Smookler’s Trustees and Galombick’s Trustee 1906 TS 623 at 631.

³ Conreff (Pty) Ltd and Another v Gallic Construction (Pty) Ltd 1981(3) SA 73W, Nicholas J at 76G ff.

Ltd v Knoetze & Sons 1970(3) SA 264A at 270). By virtue of such a lien the creditor in possession of property can retain it against his debtor until he has been paid all that is due to him under his contract in respect of work done and expenses incurred upon the property (Land Bank v Mans 1933 CPD 16 at 24). But plainly the creditor can have no right, in disregard of a contractual provision regarding delivery, to retain the property, until he has been paid money which although owing is no yet due. Thus, under the standard form of building contract, retention moneys become payable only some months after the delivery of the contract work; plainly the builder cannot claim a jus retentionis in respect of retention moneys which are not yet due. In my view the general principle is accurately stated in Halsbury Laws of England 3rd ed vol 24 para 148 at 270:

‘The debt in respect of which a lien is claimed must be due not accruing. Therefore a contract for a particular mode of future payment which precludes any implied contract for immediate payment does not give rise to a lien even where labour has been expended on a chattel. It is immaterial whether the contract for future payment is an express contract or is implied from usage of trade.’

In the present case the completion date (and by implication the delivery date in terms of clause 18) was 29 February 1980. The payment applied for by the respondent on 25 February would not become due until several weeks thereafter. Thus no amount was due and payable as at the date the application was launched and hence the respondent was not entitled to rely upon a jus retentionis as a defence to that application.”

ALASTAIR HAY
COX YEATS
12th Floor, Victoria Maine
71 Victoria Embankment

P O Box 3032
DURBAN
Tel: (031) 304 2851
Fax: (031) 301 3540
ahay@coxyeats.co.za