

ONTARIO
SUPERIOR COURT OF JUSTICE
Divisional Court

BETWEEN:)
)
SOO MILL & LUMBER COMPANY LTD.)
) Michael Mazzuca and Broghan Masters, for
Appellant/Moving Party) the Appellant
)
- and -)
)
FRANK POZZEBON, TRISHA-ANN)
POZZEBON, NICK POZZEBON, FP)
CONTRACTING (GP), P.R.G. BUILDERS) Marc Huneault for the Pozzebon and FP
INC., R & J HOLDINGS INC., RONALD) Respondents
ARCHIBALD CHAMPAGNE, and JUDY)
ANN CHAMPAGNE) Mia Carella for R & J Holdings and the
) Champagne Respondents
Respondents)
)
)
)
) **HEARD:** August 29, 2023 by Zoom

SCHABAS J.

ENDORSEMENT

- [1] The appellant Soo Mill & Lumber Company Ltd. (“Soo Mill”) seeks an extension of time in which to commence an appeal to this Court from the Order of Gordon J. dated November 18, 2021. The Respondents, other than P.R.G. Builders Inc. which takes no position, oppose the motion for an extension of time.
- [2] For the reasons that follow, the motion is granted.

Background

- [3] This case involves claims by Soo Mill for payment of supplies provided to various construction projects. This motion and appeal arises from Soo Mill’s motion under Rule 45.02 of the *Rules of Civil Procedure* for preservation of funds. As Gordon J. summarized

it in the opening paragraph of his Endorsement (*Soo Mill & Lumber Company Ltd. v. Pozzebon*, 2021 ONSC 7621):

The plaintiff extended credit to FP Contracting (GP) ("FP") for the purchase of building materials for use on several construction sites. One of those sites was sold with net proceeds in excess of \$420,000. At issue is whether the plaintiff is entitled to have those funds held in court pending the outcome of the plaintiff's action against FP.

- [4] A number of legal issues were raised, including the proper application of Rule 45.02, and whether the proceeds of sale constitute a trust fund under s 8 of the *Construction Lien Act*, RSO 1990, c. C. 30 (the "CLA"). Gordon J. concluded that there was a basis for finding that a trust claim existed, but only to the extent that the plaintiff is owed money for materials supplied for the particular property sold. This led to an order that approximately \$9,000 was to be retained in court. This was little solace to Soo Mill which is claiming that FP owes it approximately \$600,000 for materials supplied to several sites.
- [5] On December 3, 2021, Soo Mill served a Notice of Motion for Leave to Appeal the order of Gordon J. to the Divisional Court. However, because of the concern that the order might be interlocutory, and at that time the *CLA* prevented appeals of interlocutory orders, Soo Mill also commenced an appeal to the Court of Appeal.
- [6] On December 13, 2021, Favreau J., as she then was, approved Soo Mill's request that its Notice of Motion for Leave to Appeal be held in abeyance pending a determination by the Court of Appeal for Ontario on the issue of jurisdiction. On January 31, 2022, the FP respondents sent Soo Mill a draft notice of motion to quash the appeal to the Court of Appeal but took no steps to file it or proceed with the motion.
- [7] In the meantime, Soo Mill, on October 21, 2022, perfected its appeal in the Court of Appeal. Subsequently, on December 12, 2022, the Court of Appeal raised the jurisdictional issue with the parties, following which, on December 19, 2022, the FP respondents served a Notice of Motion seeking to quash Soo Mill's appeal.
- [8] As of February 21, 2023, all appeal materials had been filed with the Court of Appeal including responding materials and facts. However, at the Court of Appeal's initiative, only the jurisdictional issue was argued on March 21, 2023.
- [9] On March 28, 2023, the Court of Appeal found that it lacked jurisdiction and quashed the appeal: *Soo Mill & Lumber Company Ltd. v. Pozzebon*, 2023 ONCA 215. The court stated its reasons very briefly as follows:

We agree with the moving parties that this court does not have jurisdiction over this appeal, which falls under the provisions of the *Construction Lien Act*, [R.S.O. 1990, c. C.30](#). As for whether the order under appeal is final or interlocutory, that would be for the Divisional Court to decide. Accordingly, the appeal is quashed.

- [10] As it had indicated it would do if the appeal was quashed, Soo Mill has returned to pursue appellate relief in this Court. However, in light of the finding of the Court of Appeal, Soo Mill seeks to file a Notice of Appeal as there is no right to seek leave to appeal from an interlocutory order under the *CLA*, unlike the current *Construction Act* which now permits an appeal of an interlocutory order to this Court with leave under s. 71(1)(3).
- [11] As noted, the Court of Appeal reached no conclusion on whether the order of Gordon J. is final or interlocutory, and nor, of course, has this Court.

Issue and Discussion

- [12] The sole issue on this motion is whether Soo Mill should be granted an extension of time in which to appeal the Order of Gordon J. issued on November 18, 2021.
- [13] The test for granting an extension of time is well-settled and not disputed by the parties. As Gillese J.A. stated in *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131 at para. 15:

The overarching principle is whether the "justice of the case" requires that an extension be given. Each case depends on its own circumstances, but the court is to take into account all relevant considerations, including

- (a) whether the moving party formed a *bona fide* intention to appeal within the relevant time period;
- (b) the length of, and explanation for, the delay in filing;
- (c) any prejudice to the responding parties caused, perpetuated or exacerbated by the delay; and
- (d) the merits of the proposed appeal.

- [14] The respondents do not dispute that Soo Mill formed a *bona fide* intention to appeal within the time period. Indeed, the evidence is very clear that they did so.
- [15] The explanation for the delay has been set out above and is reasonable. Although the respondents point out that they raised the jurisdiction issue early on, their failure to move promptly to quash the appeal and, moreover, their work to respond to the merits of the appeal by responding to it fully in the Court of Appeal, demonstrates that the jurisdictional question was very much a live issue.
- [16] There is also little or no prejudice to the responding parties caused by the delay. Indeed, the failure to move to quash the appeal lays some of the blame for the delay with the respondents. Further, as arguments on the merits of the appeal were prepared for the Court of Appeal, those materials should be readily adaptable to an appeal in this Court.

- [17] The respondents submit that they will be prejudiced because Soo Mill is seeking execution before judgment, wishing to tie up funds as security for a judgment it may or may not be able to obtain. This, however, is not prejudice arising from extending time to file a notice of appeal but relates to the merits of the appeal.
- [18] This leaves the issue of the merits of the appeal, which the respondents argue should carry the day and result in denying the extension of time.
- [19] I do not agree. There is no question that a motion for an extension can be dismissed solely on this branch of the test. In *Enbridge*, the court dismissed a motion on this basis. That case involved a request to extend time for filing a motion for leave to appeal and considered the test to be met for granting leave, which is a high one. It requires, among other things, that “the proposed appeal presents an arguable question of law, or mixed law and fact, requiring consideration of matters such as the interpretation of legislation; the interpretation, clarification or propounding of some general rule or principle of law; the interpretation of a municipal by-law where the point in issue is a question of public importance; or the interpretation of an agreement where the point in issue involves a question of public importance”: *Enbridge* at para. 20.
- [20] Here, the moving party wishes to file a notice of appeal, on the basis that it has a right to an appeal under the CLA. Soo Mill has raised, at the very least, arguable questions of law or mixed law and fact. This includes the interpretation and application of the statutory trust provision in s. 8 of the *Construction Act*. Soo Mill also argues that the decision of Gordon J. is inconsistent with the remedial purpose of the *Act*, as stated by the Court of Appeal in *Sunview Doors Limited v. Pappas*, 2010 ONCA 198 at para. 99:
- The object of the [Act](#) is to prevent unjust enrichment of those higher up in the construction pyramid by ensuring that money paid for an improvement flows down to those at the bottom. In seeking to protect persons on the lower rungs from financial hardship and unfair treatment by those above, the [Act](#) is clearly remedial in nature. The remedial nature of the [Act](#) also supports a liberal construction so as to enable it to serve its purpose. The purpose of s. 8 is to impress money owing to or received by contractors or subcontractors with a statutory trust, a form of security, to ensure payment of suppliers to the construction industry.
- [21] Soo Mill also argues, among other things, that Gordon J. erred in determining its substantive rights on a motion under Rule 45, which deals with interim relief and all he needed to do at that stage was be satisfied that there was a serious issue to be tried. (See *Sadie Moranis Realty Corporation v. 1667038 Ontario Inc.*, 2012 ONCA 475 at para. 18)
- [22] The respondents take issue with the merits of the appeal, and argue that the order of Gordon J. is, in fact, interlocutory. These are substantive issues to address on a motion or before the panel hearing the appeal. At this stage, I am not in a position to determine them, and find, for purposes of granting an extension of time, that the appeal raises arguable questions and has at least some merit.

[23] In my view, the justice of the case requires that the motion to extend time be granted. There is no demonstrated prejudice to the respondents, and the other factors on a motion to extend time clearly favour the moving party, therefore the motion is granted.

[24] The respondents shall pay costs in the agreed upon amount of \$5,000.

Paul B. Schabas J.

Date: September 06, 2023