

Riordan Leasing Inc. v. Veer Transportation Services Inc.
et al.

[Indexed as: Riordan Leasing Inc. v. Veer Transportation
Services Inc.]

61 O.R. (3d) 536
[2002] O.J. No. 3184
Court File No. C-1444/01

Ontario Superior Court of Justice
Glithero J.
July 22, 2002*

[* Note: This judgment was recently brought to the
attention of the editors.]

Personal property security -- Repairer's lien -- Priorities
-- Leased trailer repossessed by lessor and re-leased to third
party -- Third party having right to purchase trailer at the
end of the lease -- Lease registered under Personal Property
Security Act -- Non-possessory lien claim under Repair and
Storage Liens Act registered after trailer re-leased to third
parties -- Third party having priority over lien claimant --
Lien claimant having priority over lessor if third party not
exercising right to purchase -- Repair and Storage Liens Act,
R.S.O. 1990, c. R.25.

Personal property security -- Repairer's lien -- Amount of
lien -- Costs of registering lien or costs of bailiff not to be
added to the value of the lien -- Repair and Storage Liens Act,
R.S.O. 1990, c. R.25.

Riordan Leasing Inc. ("Riordan") leased seven trailers to
Veer Transportation Services Inc. and to associated
corporations (collectively "Veer"). Veer retained Jap Truck

& Trailer Repairs Inc. ("Jap") to perform work on the trailers. Jap was not paid, and it claimed a non-possessory lien under the Repair and Storage Liens Act ("RSLA") in the amount of \$5,617.50. The liens were not immediately registered under the RSLA and, before the liens were registered, Veer defaulted in making payment under the leases or the leases expired, and Riordan repossessed the trailers and re-leased them to third parties. The leases to the third parties contained a provision that upon expiry of the lease term, the third party had a right to purchase the trailer for \$1. The leases to the third parties were registered under the Personal Property Security Act. Jap retained Bill McFadden Ltd. ("McFadden"), a bailiff, to register the liens under the RSLA. Before registering, McFadden did a PPSA search that revealed the third party leases. Then, McFadden registered the liens under the RSLA, and Jap claimed fees and disbursements of \$5,617.50. Riordan was given no notice of any claim for the repair costs nor any notice of the liens until they had been registered. Riordan applied, amongst other things, for a declaration that the liens under the RSLA should be vacated and discharged and for a declaration that no moneys were owed by Riordan to Veer, Jap or McFadden.

Held, the application should be allowed in part. [page537]

Section 10 of the RSLA provides that a non-possessory lien is enforceable against third parties only if it has been registered. If the lien has not been registered, then a third party acquiring a right against the article has priority. In the immediate case, the third party leases had priority over the subsequently registered non-possessory liens. Further, if the third parties exercised their right to purchase, then the liens would be unenforceable against them. However, if the options to purchase in the leases were not exercised, then the possession of the trailers would revert to Riordan and the liens would then be enforceable against Riordan. While Riordan did not contract for the repairs of the trailers, it did lease them to persons who were obligated under the lease to engage such repairs as were necessary to keep the vehicles in good condition. The liens were enforceable if Riordan regained possession of the trailers at the end of the leases.

Riordan was correct in submitting that payment of the fees and disbursements of the bailiff could not be made a condition precedent to the discharge of the non-possessory liens. Section 28 of the RSLA entitles a lien claimant, who is in possession of the article, to recover the "commercially reasonable expenses incurred in the custody, preservation, and preparation for sale" of the article, and the section expressly includes the costs of insurance, taxes or "other charges incurred therefor". Subsection (3) provides that the lien claimant is not entitled to interest as part of its expenses. The expenses protected under s. 28 relate to money spent in the preservation of the article or preparation for its sale but not to money spent in registering the lien. Further, s. 12 of the RSLA, which entitles a person to the discharge of a non-possessory lien upon payment of the amount of the lien, does not address the bailiff's charges. If the costs of registering the lien, or the costs of employing a bailiff to do so, had been intended to be added to the value of the lien and recovered as a condition precedent to the discharge of the debt, the Act would have said so.

Cases referred to

Altruck Transportation Services v. Barry Humphrey Enterprises Ltd. (1993), 101 D.L.R. (4th) 470, 5 P.P.S.A.C. (2d) 81 (Ont. Gen. Div.); General Electric Capital Canada Inc. v. Interlink Freight Systems Inc. (1998), 42 O.R. (3d) 348, 7 C.B.R. (4th) 173, 14 P.P.S.A.C. (2d) 198 (Gen. Div.)

Statutes referred to

Personal Property Security Act, R.S.O. 1990, c. P.10
Repair and Storage Liens Act, R.S.O. 1990, c. R.25, ss. 1, 3, 5, 7, 10, 12, 23, 28

APPLICATION pursuant to s. 23 of the Repair and Storage Liens Act, R.S.O. 1990, c. R.25.

Gary L. Petker, for applicant.

Justin J. Robinson, for respondents Bill McFadden Ltd. and Jap Truck & Trailer Repairs Inc.

[1] GLITHERO J.: -- This application raises issues concerning the following:

- (a) The enforceability of non-possessory liens;
- (b) The ability of the lien claimant, or a bailiff, to enforce payment of the bailiff's fees as part of the payment owing on the lien; [page538]
- (c) Aside from whether the liens are enforceable, the legitimacy of the lien claims.

[2] The applicant ("Riordan") is a lessor of trailers.

[3] Jap Truck & Trailer Repairs Inc. ("Jap") claims to have performed work on the trailers and filed liens pursuant to the Repair and Storage Liens Act, R.S.O. 1990, c. R.25 ("RSLA").

[4] Veer Transportation Services Inc., 1339916 Ontario Inc. o/a VTD Services, Tarnjit Singh Garcha and/or Gurdip Singh ("Veer") were the corporations and their principals who were the lessees of the trailers in question at the time the repairs were allegedly done by Jap. These respondents have not appeared on or defended the application.

[5] The total amount of liens claimed in respect of all seven trailers is \$5,866.13.

[6] Bill McFadden Ltd. ("McFadden") was the bailiff employed by Jap to register the liens under the RSLA. McFadden claims payment of fees and disbursements of \$5,617.50 to be paid before discharge of the liens.

[7] Riordan was given no notice of any claims for the repair costs allegedly incurred in respect of trailers owned by Riordan but leased at the time to Veer, nor any notice of the

liens, until after they had been registered.

[8] Except as indicated below, the trailers were apparently either repossessed when Jap could no longer honour the leases owing to its financial insolvency, or its leases expired. In any event, Riordan reacquired possession of the trailers in question and re-leased them to third parties. These leases to the third parties contain a provision that upon expiration of the lease term, the new lessee has the right to purchase the trailer for the sum of \$1. These leases were registered under the Personal Property Security Act, R.S.O. 1990, c. P.10 ("PPSA").

[9] The relevant sequence of proceedings in respect of each of the trailers in question is that the repair work on each was allegedly done on various specific dates falling between March 3 and July 26, 2001. These trailers were then each re-leased to third parties between October 3 and October 22, 2001. The third party leases were registered under the PPSA before October 26, 2001. On October 26, 2001, the bailiff did a PPSA search which revealed the registration of the third party lease in respect of each trailer. On October 29, 2001, the bailiff registered the non-possessory [lien] between Riordan and the third party lessee.

[10] The trailers in question, as identified by the last four digits of their VIN, and the amounts claimed to be owing for the repairs and for bailiff fees and disbursements are as follows: [page539]

- (i) VIN #4623 -- Three repair orders totalling \$1,059.29. Bailiff's claim for fees and disbursements totalling \$1,337.50.
- (ii) VIN #4624 -- Repairs totalling \$368. Bailiff's charges unknown.
- (iii) VIN #0058 -- Five repair orders totalling \$1,297.90. Bailiff's claim for fees and disbursements totalling \$856.
- (iv) VIN #4625 -- Three repair orders totalling \$881.63.

Bailiff's claim for fees and disbursements totalling \$749.

- (v) VIN #0056 -- One repair order totalling \$177.08. Bailiff's fees and disbursements totalling \$642.
- (vi) VIN #1402 -- Two repair orders totalling \$1,075.79. Bailiff's fees and disbursements totalling \$695.50.
- (vii) VIN #4626 -- In respect of this trailer, a work order dated March 16, 2001 claims the amount of \$383.06. The original affidavit filed on behalf of the applicant claims that it is the registered owner of that trailer. A subsequent affidavit from the same person claims that that trailer either does not exist or is not a trailer owned by Riordan. Counsel for the respondents claims that Riordan does own it and that an ownership exists for that vehicle. If the trailer is owned by Riordan, and has been leased out to a third party by written lease which was registered under the PPSA prior to the October 26, 2001 search under the PPSA by the bailiff, and prior to the registration of the lien on October 29, 2001, then there is no reason why the result with respect to this trailer should differ from any of those in the preceding paragraphs. If this trailer is not owned by Riordan, and has not been leased to a third party, which appears to be Riordan's current stand, then it becomes unimportant to the application. I intend my disposition to apply to this trailer if it becomes evident that it is owned by Riordan, and has been re-leased in the same manner as the preceding trailers. The bailiff wants payment of \$642 before this lien can be discharged.
- (viii) VIN #0080 is in respect of a trailer which is no longer of concern to this application. Work orders dated March 22 and July 10, 2001 showing a total of \$682.66 were apparently paid, together with the bailiff's costs in the amount of \$695.50 by a subsequent purchaser from Riordan and accordingly unless the lien has been discharged already, an order should go requiring the registrar to amend the [page540] information recorded in the central file to indicate the discharge of that lien.

[11] Riordan's application seeks a declaration that the liens registered by Jap with respect to the first seven trailers I have discussed above are invalid and of no force and effect, and an order that registration of the liens with respect to those first seven trailers be vacated and discharged, and a declaration that Jap is not entitled to a lien over any of those trailers, a declaration that no moneys are owing by the applicant to the respondents, and an order that Veer indemnify and save harmless the applicant from any and all claims of Jap and McFadden.

[12] Section 23 of the RSLA entitled any person to apply to the court for a determination of the parties' rights with respect to issues concerning the amount of a lien or the right of any person to a lien, or any other matter arising out of the application of the Act. In this case, Riordan commenced this application before any seizure of the trailers was effected or commenced.

Legitimacy of the Liens

[13] The affidavit material of the applicant expresses disbelief that the amounts claimed to be owed and secured by the liens are legitimate, and deposes that within the trucking industry false claims for such amounts are common. Riordan claims that it is the obligation of the lien claimant to prove the entitlement to the lien, rather than Riordan having the obligation to disprove the entitlement. Riordan in large part bases its claim that the liens are not legitimate on concerns arising out of the bookkeeping or accounting methodology of the respondent Jap. While the work orders in question purport to cover dates ranging over the period from March 3, 2001 to July 26, 2001, and to cover 17 work orders, the work order numbers are virtually consecutively numbered. Jap has explained this by indicating that the work orders come off a pad, and that a separate pad is used for each customer, so that it is to be expected that work orders for a particular customer over a period of time will in fact be consecutively numbered. There are a few gaps in the numbering and counsel for Jap suggests that this can be explained by the fact that the principals of

Jap are not sophisticated business people and maintain poor records. It is suggested that the odd missing number of work order probably stems from the fact that mistakes were made in filling it out and it was discarded and a new one started. For reasons not clear on the evidence, at least to me, Jap also created computer generated work orders with respect to these same items, and those work orders bear different numbers than the [page541] handwritten ones. Even more curious, the work orders on the computer generated set bear numbers which are from a totally different series of numbers than that utilized in the handwritten ones, and the computer generated ones have even more discrepancies in terms of not being consecutively numbered in more instances.

[14] Riordan also relies on the fact that Jap has not produced the actual work order book so as to permit Riordan to satisfy itself as to why numbers are missing and to make sure there are not other irregularities contained therein, despite the fact that there was an undertaking to produce it. It is claimed now that it cannot be found. Riordan relies on the fact that there was no attempt to collect on any of these work orders until after Veer had closed operations. Before closing, Veer used the services of a paralegal who shared office space with the bailiff, and that paralegal's wife is the bailiff's secretary. Despite this, on cross-examination the bailiff insisted that he had no contact with Veer concerning these trailers.

[15] The bailiff claimed to have had to physically search for the trailers, and claims to have run PPSA and VIN searches, but on cross-examination on his affidavit it was disclosed for the first time that in fact he possessed copies of the ownership papers for these trailers.

[16] Riordan also relies on the fact that Jap undertook to produce its accounting journals but has not done so. Riordan wanted access to the accounts receivable and sales records to verify that the repairs reflected in the questioned work orders were in fact recorded in the expected journals of Jap.

[17] Riordan also points to inconsistencies within the

evidence of the deponent on behalf of Jap, and as between that deponent and the bailiff on his cross-examination in respect to Jap's records and the bailiff's use of them or knowledge of them in his role in the matter.

[18] Against this, there is the sworn evidence of Mr. Singh that these invoices are legitimate, and represent valid claims for work actually done on the trailers in question. There is a signature on each of the work orders which, on the evidence, is that of one of the principals of Veer, and those work orders contain descriptions of the trailer in question, the services to be provided and the amounts to be charged.

[19] Riordan has produced no evidence, of an expert nature or otherwise, that constitutes any proof that the claimed work was not done or does not appear to have been done to the trailers by virtue of an examination of them.

[20] Accordingly, on this issue, I have sworn direct evidence that the work was done as claimed, on these trailers, and that [page542] the amounts are legitimate. Against that I have a failure to produce some relevant documentation, despite undertakings to produce it, and the suspicions of Riordan arising from what admittedly appear to be curious inconsistencies in the work order numbering sequence.

[21] I am not prepared, on the basis of the evidence placed before me, to reject the sworn direct evidence that these claims are legitimate, particularly on the basis of suspicion arising out of the numbering sequence, or the failure to produce some materials which the respondent undertook to produce but has not. While suspicious, I am not prepared to draw the inferences requested by Riordan. I find on a balance of probabilities the lien claimant has demonstrated that the claims are legitimate. This finding is restricted to the lien claimant's claim, not that of the bailiff.

Priority as Between Registered Non-Possessory Liens Under the RSLA, and Third Party Leases Registered Under the PPSA

[22] Pursuant to s. 5 of the RSLA, Jap's possessory lien was

surrendered when the trailers were returned to Veer.

[23] Pursuant to s. 7 of the RSLA, Jap acquired a non-possessory lien when it gave up possession of the trailers to Veer.

[24] Section 10 provides that a non-possessory lien is enforceable against third parties only if it has been registered. If the lien has not been registered, then a third party acquiring a right against the article has priority.

[25] Riordan relies upon s. 10 and on the fact that the third party leases were registered under the PPSA prior to the registration of the non-possessory liens, and claims accordingly that the third party leaseholders have priority.

[26] The respondents submit that the non-possessory liens take priority over the third party leases, despite the fact that the leases were registered under the PPSA prior to the registration of the liens under the RSLA. They rely on *General Electric Capital Canada Inc. v. Interlink Freight Systems Inc.* (1998), 42 O.R. (3d) 348, 14 P.P.S.A.C. (2d) 198 (Gen. Div.). In my opinion, that case is not directly applicable to this, in that there the contest was between the trustee in bankruptcy and the repairer of the vehicles. The trustee in bankruptcy cannot have any higher position than did the bankrupt, and the court held that the non-possessory liens had priority over the other unsecured creditors of the bankrupt estate. At para. 5 [p. 350 O.R.], the court noted that the lien would be enforceable against third parties "save for bona fide purchasers and financiers who claim an interest in the subject [page543] matter of the lien after it arose but before registration". I see nothing else in that case that would defeat the priority of a third party who acquires an interest in the item and registers that interest under the PPSA prior to notice of any lien claim or the registration of the lien.

[27] While one can understand the need to protect repairers who perform work on vehicles but then are not paid, it is also important to protect those who enter into financial obligations with respect to such vehicles without notice of any outstanding

repair liens, and where the third party's interests are registered prior the registration of any lien.

[28] The third party leases create a possessory interest in favour of the third party lessees. Given the option to purchase the trailer at the end of the lease, for \$1 and given that the trailer will obviously have a value in excess of that amount at the end of the lease, even if it is only for scrap, in my opinion the third party leases registered under the PPSA have priority over the subsequently registered non-possessory liens. In my opinion, the liens are unenforceable as against the third party lessees. If, however, the option to purchase the trailer at the end of the [lease] is not exercised, then possession of the trailer reverts to Riordan and ownership of the trailer remains in Riordan and the lien would then be enforceable against Riordan. While Riordan did not contract for the repairs of the vehicles, it did lease those vehicles to persons who were obligated under the lease to engage in such repairs as were necessary to keep the vehicles in good condition.

[29] Pursuant to s. 23 of the RSLA, I order that the third party leases registered under the PPSA have priority over the non-possessory liens registered under the RSLA, and that the non-possessory liens are unenforceable as against the third party lessees. Should the third party lessees exercise the option to purchase the trailer at the end of the lease, such third parties continue to have priority over the lien claimants and the liens are unenforceable against them. If the option to purchase is not exercised, and the trailer is returned to Riordan, then in my opinion the lien claimant then has priority and can enforce the lien against Riordan.

[30] In my opinion, neither Riordan nor the third party lessees are entitled to a discharge of the non-possessory liens registered, as such liens are valid and remain enforceable as against Riordan if Riordan regains possession of the vehicles at the end of the leases.

Claim of the Bailiff McFadden

[31] Riordan claims that payment of the fees and

disbursements of the bailiff cannot properly be made a condition precedent to the [page544] discharge of the non-possessory liens. Section 3 of the RSLA provides that the lien is for the agreed cost of the repairs, or their fair value. Section 1 of the Act defines "repair" [as] the cost of labour and materials for the purpose of altering, improving, restoring or maintaining its condition and includes transportation, towing and salvage of the article. In my opinion, bailiff fees are not included in the repair costs thereby created.

[32] Section 28 of the RSLA entitles a lien claimant, who is in possession of the article, to recover the "commercially reasonable expenses incurred in the custody, preservation and preparation for sale" of the article, and the section expressly includes the cost of insurance, taxes or "other charges incurred therefor". Subsection 3 provides that the lien claimant is not entitled to interest as part of its expenses. In my opinion, the expenses protected under s. 28 relate to money spent in the preservation of the article or preparation for its sale, but does not include any expenses incurred in registering its lien.

[33] I further rely on s. 12 of the RSLA, which entitles a person to the discharge of a non-possessory lien upon payment of the amount of the lien. If the costs of registering the lien, or the costs of employing a bailiff to do so, had been intended to be added to the value of the lien and recovered as a condition precedent to the discharge of the lien, the Act would have said so.

[34] I further have regard to the fact that there is evidence before me that of the approximate amount of \$4,000 claimed by the bailiff for fees, only two hours of work was expended by the bailiff in providing its services in respect of all these trailers.

[35] In my opinion, the *Altruck Transportation Services v. Barry Humphrey Enterprises Ltd.* (1993), 101 D.L.R. (4th) 470, 5 P.P.S.A.C. (2d) 81 (Ont. Gen. Div.) decision is distinguishable as in that case there was a seizure by the sheriff pursuant to

the lien. In addition, the authorization in that case permitted recovery [of], in addition to the amount of the repair bill, "all or any deficiencies". The written authorization for the repair work entered into in respect of all these trailers is restricted to an acknowledgement of indebtedness for the amount of the repair work order, and does not go on to accept responsibility for other charges.

[36] Accordingly, I order that the bailiff's fees and disbursements are not recoverable against Riordan or the third party lessees, and that if Riordan becomes entitled to a discharge of the liens by virtue of a third party lessee exercising its option to purchase pursuant to the registered leases, such discharge is to be effected without obligation to pay the bailiff's fees or disbursements. [page545]

Errors in Registrations

[37] Paragraph 2(c) of the notice of application includes as a ground for the application alleged misidentifications or errors in registration in respect of these liens, and alleges that a reasonable person would likely be materially misled. That argument was not advanced during the oral submissions. In my opinion, in the circumstances of this case, and given the search mechanisms available in the search system common to both the PPSA and the RSLA, such errors would not be likely to materially mislead a reasonable person.

Quantum Meruit Claim

[38] Jap claims the repair amounts as against Riordan on the basis of quantum meruit or unjust enrichment, on the premise that while not contracted for directly by Riordan, the repairs were contracted for by its lessee, who had an obligation to keep the trailers in good repair, and accordingly, Riordan benefited from the repairs in that its trailers were maintained in good condition. In examining the various repair work orders, placed before me in "bundle one", the items included thereon both in respect of parts and labour can fairly be described as fairly routine maintenance items. I have no evidence that the trailers had any increase in value at the time Riordan re-

acquired them and then re-leased them. I have no evidence that there is a betterment to Riordan for which it ought to pay. I have no evidence as to the life expectancy of the value of the repair items. Being of a maintenance nature, they may have been done and redone several times since the repairs by Jap. It may well be that the value of the work done by Jap for Veer was entirely used up or consumed during the period of time that Veer continued to have possession of the trailers. I am not satisfied that Jap has established a valid claim under this heading.

Conclusion

[39] For the foregoing reasons, an order will go declaring that the liens registered by Jap are unenforceable as against the third party lessees during the term of the lease, or thereafter if the option to purchase is exercised in respect of any particular trailer.

[40] The application for a declaration that the liens are invalid and of no force and effect, and for the vacation and discharge of them is dismissed as such liens remain valid unless and until the option to purchase in respect of any particular trailer is exercised. The application for a declaration that no moneys are owing [page546] by Riordan to the respondents is dismissed in respect of Jap, but allowed in respect of McFadden.

[41] The application for a declaration that Veer indemnify and save harmless the applicant from any and all claims of Jap, in so far as any may become payable, is granted.

Costs

[42] It seems evidence to me that the amounts in issue in respect of these liens is very much overshadowed by the costs associated in bringing and defending the application. It was put to me as being an application involving matters of importance to those involved in these industries. The application has succeeded in some respects and failed in others, although in my view it would seem likely that

eventually Riordan's position will prevail.

[43] In all of the circumstances, my preliminary thought would be that it would be appropriate if each party bore its own costs. However, I have not received submissions on costs, and I am open to receiving submissions in writing from either or both parties within 21 days of the release of these reasons. If no such submissions are received, there will be no order as to costs.

Order accordingly.